United States Court of Appeals

for the Second Circuit

APPENDIX

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

ORIGINAL

75-7053

WILLIAM GARAFOLA,

Plaintiff-Appellee,

-against-

F.A. DETJEN, "SAAR,"

Defendant and Third Party
Plaintiff-Appellee,

-against-

PITTSTON STEVEDORING CORP.,

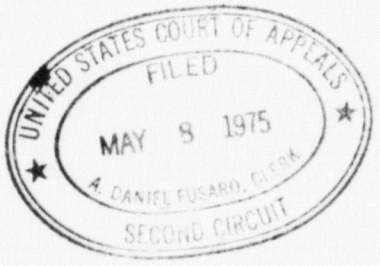
Third Party Defendant-
Appellant.

B

P/S

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE EASTERN
DISTRICT OF NEW YORK

JOINT APPENDIX



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7

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TABLE OF CONTENTS

	PAGE
Docket Entries	1a
Excerpts from Trial Testimony	5a
Special Verdict	219a
Judgment Appealed From	221a
Notice of Appeal	223a

INDEX TO EXCERPTS
FROM TRIAL TESTIMONY

WILLIAM GARAFOLA, PLAINTIFF	
Direct	5a
Cross - Shipowner	22a
Cross - Stevedore	39a
Redirect	49a
Recross - Stevedore	50a
ROCCO MISSUD	
Direct	51a
Cross - Shipowner	56a
DR. PHILIP A. BARENFELD	
Direct	59a
Cross - Shipowner	76a
Cross - Stevedore	81a
RICHARD SCOTT	
Direct	85a
Cross - Shipowner	91a
Cross - Stevedore	94a
PAUL J. KEELER	
Direct - Shipowner	105a
Cross - Stevedore	113a
Cross - Plaintiff	114a
Recross - Stevedore	118a

TABLE OF CONTENTS

INDEX TO EXCERPTS
FROM TRIAL TESTIMONY
(Continued)

	PAGE
COSMO PANACIO	
Direct - Plaintiff	121a
Cross - Shipowner	124a
DR. THOMAS WEISS	
Direct - Stevedore	125a
Cross - Plaintiff	128a
Rulings on Requests to Charge	135a
Summation	
Shipowner	138a
Plaintiff	155a
Court's Charge	183a
Exceptions to Charge	201a

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

WILLIAM GARAFOLA,

Plaintiff-Appellee,

-against-

F.A. DETJEN, "SAAR,"

Defendant and Third Party Plaintiff-Appellee,

-against-

PITTSTON STEVEDORING CORP.,

Third Party Defendant-Appellant.

DOCKET ENTRIES

DATE	FILINGS—PROCEEDINGS
6- 1-71	Complaint Filed. Summons Issued.
6-29-71	Summons returned and filed. NOT served.
7-21-72	Supplemental summons issued.
7-21-72	Supplemental summons and complaint mailed to F.A. Detjen, Kajen, 6-8,2 Hamburg 11, Germany
12-28-72	Notice of appearance of deft filed.
1-15-73	Answer to amended complaint filed.

DOCKET ENTRIES

DATE	FILINGS—PROCEEDINGS
1–15–73	Third-party complaint filed Third-party summons issued
1–15–73	Deft's interrogatories to third-party deft filed.
1–15–73	Deft's interrogatories to pltff filed.
1–24–73	Notice of taking deposition of Pittston Stevedoring Corp ret 4-25-73 at 120 Broadway, NYC filed.
1–24–73	Notice of taking deposition of William Garafola ret 3-28-73 at 120 Broadway, NYC filed.
2– 2–73	3rd Party Summons returned and filed—executed
2–27–73	Answer of third-party deft Filed.
2–27–73	Third-party deft's Interrogatories to third-party pltff filed.
3–12–73	Notice to take deposition of pltff & deft by 3rd-party deft filed.
3–30–73	Notice to take deposition of pltff & 3rd-party pltff filed.
4–12–73	Before Bruchhausen, J.—Case called for p/t conf.—Adjd. to 10/1/73
7–12–73	Pltff's answers to interrogatories filed.

DOCKET ENTRIES

DATE	FILINGS—PROCEEDINGS
7–13–73	Notice of motion to amend the Ad Damnum clause of complaint filed.
10– 1–73	Before BRUCHHAUSEN, J.—Case called for pre trial conference. Adjd to 12-15-73 for trial.
12– 4–73	Before BRUCHHAUSEN, J.—Case called—Trial commenced—Jury impanelled—Cont'd to 12/5/73
12– 5–73	Before BRUCHHAUSEN, J.—Case called. Trial resumed. Con't to 12-6-73
12– 6–73	Before BRUCHHAUSEN, J.—Case called—Adjd to 12/7/73
12– 7–73	Before BRUCHHAUSEN, J.—Case called. Trial resumed. Counsel summed up. Jury charged.—Jury returned and rendered a verdict in favor of the plaintiff in the sum of $235,000.00. Third-party pltff entitled to judgment over against third-party deft.
12–10–73	JUDGMENT ON JURY VERDICT FILED, dtd 12-7-73. Pltff to recover $235,000 with costs. Third party pltff entitled to judgment over
1– 4–74	Notice of appeal filed. Duplicate mailed to C of A and attys. jn
1– 7–74	Stenographer's transcript dtd 12-4-73 filed.
1– 7–74	Stenographer's transcript dtd 12-6-73 filed.

DOCKET ENTRIES

DATE	FILINGS—PROCEEDINGS
1– 7–74	Stenographer's transcript dtd 12-7-73 filed.
1– 8–74	Bond undertaking for costs on appeal filed.
1– 9–74	Bill of costs filed. Costs taxed against F.A. Detjen in the amount of $344.36.
1–17–74	$260,887.88 bond on appeal filed.
1–17–74	Deft's notice of protective cross-appeal filed. Duplicates mailed to C of A and attys. jn
2–11–74	Above record on appeal certified and handed to R. W. Johnson for delivery to the C of A.
2–14–74	Acknowledgment received from C of A for receipt of record on appeal & filed.
3–25–74	Certified copy of judgment received from C of A dismissing appeal of Pittston Stevedoring Corp filed. jn
12–13–74	By BRUCHHAUSEN, J.—Final judgment filed. Ordered that the final judgment dtd 12-7-73 be vacated & pltff Wm. Garafola recover from deft F A Detjen, etc the sum of $235,000 with costs in the sum of $244.36, etc. (p/c mailed to attys)
1–10–75	Notice of Appeal filed. Copy sent to C of A. JN.
1–23–75	Notice of Protective cross-appeal by deft and third party pltff filed. Copy sent to C of A. JN

* * * * *

MR. BUSHLOW: One more thing, your Honor. It is hereby stipulated by and between all the parties that the medical expenses in this matter are in the sum of $16,000.

THE COURT: Very well.

MR. STANZIALE: So stipulated.

* * * * *

Q Are you the plaintiff in this action, Mr. Garafola?

A Yes, sir.

Q What is your occupation?

A Longshoreman.

Q How long have you been a longshoreman, Mr. Garafola?

A About 17-1/2 years.

Q Mr. Garafola, at the time of this accident, when this accident happened, were you working on a ship?

A Yes, sir, in the hold of the ship.

Q Do you remember the day of the week that was?

A December 20, 1969.

Q What day of the week was it?

A Saturday.

MR. O'BRIEN: Excuse me, your Honor. I would like to make an application if there are any fact witnesses in the courtroom that they be excluded at this point.

THE COURT: Yes. I ask they be excluded and the Court Officer will show them to the witness room.

MR. BUSHLOW: At the same time, may any of the defense witnesses be excluded?

THE COURT: Yes.

MR. O'BRIEN: The defendant has no fact witness in court.

THE COURT: All right.

MR. BUSHLOW: If your Honor pleases, there is a defendant's expert witness; may I ask he be excluded at this time?

MR. O'BRIEN: I don't think an expert can be excluded.

THE COURT: Unless you have some support for your request I will deny that request.

MR. BUSHLOW: All right, your Honor.

Q Before this day, Mr. Garafola, on say Friday, Thursday, Tuesday and Wednesday, what kind of work did you do on the pier?

A I am an extra labor man. I belong in the steady extra labor.

Q What is extra labor?

A I work for Pittston but as extra labor on trucks.

Q Is that done on the pier or on the vessel?

A On the pier. We take cargo out and put it in.

Q On December 20, 1969, who was your employer?

A Pittston Stevedoring Company.

Q How did you get this job this Saturday morning?

A We belonged to the same pier so I shaped up at the

hiring hall.

Q What do you mean by you shaped up?

A I go down and we are the first ones to be hired because we belong to the pier. We are hired first, the hold man.

Q Were you hired that morning?

A Yes.

Q Did you go back to the pier?

A Yes, sir.

Q Who did you report to on the pier?

A The foreman.

Q Did he send you somewhere?

A He needed me in a certain gang.

Q Where did he send you?

A Roberts gang.

Q Was it Bobby's?

A Yes.

Q What hatch?

A No. 2 hatch.

Q Was there anybody else that was hired with you that you knew that morning?

A Yes, six or seven, maybe more.

Q Anybody in particular?

A Rocco, the maintenance man, I seen him once in a while.

Q Did he go into the same hatch with you?

A Yes, in the hold.

Q When you got on the ship about what time was it?

A About 8:30.

Q Were you loading?

A Loading empty cargo.

Q In the morning, what was it?

A Heavy drums, about 900 pounds each. Two at a time.

Q Did you do that until 12 o'clock?

A Yes. That was filled into the wings.

Q Where did you go at 12 o'clock?

A To eat.

Q What time did you get back?

A One o'clock, quarter to one.

Q When you got back, where did you go?

A Back to No. 2 hatch.

Q Were you still loading or --

A Loading containers and pallets.

Q Were these containers full of cargo or empty?

A Empty.

Q Mr. Garafola, did you have an accident that day?

A Yes, I did.

Q About what time of the day did that accident happen?

A 4:15, 4:20 in the afternoon.

Q Just before this accident, Mr. Garafola, I ask you to look at these containers and pallets as we have them here (indicating).

Can you state whether or not this represents the condition at the time immediately before you had your accident?

A Yes, just like that.

Q Would you please -- with His Honor's permission + come down and show the jury where you were standing just before the accident.

THE COURT: Yes.

A Me and Rocco --

Q Where were you standing?

A At the end of the platform.

Q How much space was there between the wall of the container and this container, approximately?

A Foot and a half to about a foot.

Q Did you receive any orders at that time to do anything?

A Before I come to here I asked for a container to put in that space seven by seven feet.

Q You say there was a space there?

A Right here (indicating).

Q Was there any cargo in that space?

A No.

Q Was it an empty space?

A Yes.

Q What did you do?

A I told the guy: "For crying out loud, put a container here."

MR. STANZIALE: I move to strike out the latter part of the statement.

THE COURT: Granted.

Q Did he put a container in the space?

A He said, "Never mind, we don't need it."

Q Did they put a container in that space?

A No.

Q Any other cargo?

A No.

Q Was that space open?

A Yes.

Q It stayed open?

A Yes.

Q Did you get any orders to do anything?

A Yes. He said come up anyway.

MR. STANZIALE: I move to strike what the statements were.

THE COURT: Yes.

MR. BUSHLOW: He can testify to the orders he got.

Q Did you get an order?

A Yes, to come up.

Q Who gave you that order?

A The gangway man.

Q Was the hatch boss there that day?

A No.

Q What was his name?

A Robbie.

Q Do you know who was in charge of the gang that day?

A I know his face, not his name.

Q Where was he standing?

A On the corner, looking down.

Q He gave you an order to do what?

A Come up.

Q What did you say?

A Give me a ladder. There is a big hole here. You need at least a 20-foot ladder to put that in the space left open, seven by seven feet.

Q Did you get a ladder?

A No. I asked. They were supposed to give me a ladder, the ship always supposed to give you a ladder.

Q Did any ladder come down?

A No.

Q Did anybody else within your hearing ask for a ladder?

A Yes, Rocco asked for a ladder.

Q Who is Rocco?

A The other fellow with me, standing up on the --

Q What response did you get when you asked for a ladder?

A They said come on up. We only got another half hour, come on up.

Q What did you start to do?

A I walked where the pallets were and started walking up.

Q Tell us just --

A I stepped on something and slipped and I lost my balance and I went right in that hole in the center.

Q How far would you say you fell?

A About 13 feet.

Q When you fell, do you know what parts of your body you injured?

A Sure. My leg hit some of the pallets on the edge of the container about here (indicating). I broke my leg very bad.

Then my back, elbow, not my head but my brain shook so

much that I got noises in my ear day and night.

THE COURT: I assume you can go back to the witness stand now.

Q Mr. Garafola, when you finally landed, what were you on?

A I had a heavy leather jacket that helped me a lot.

Q Were you on the deck of the ship or the bottom of the ship or on a container --

A On the steel bottom.

Q If you remember, did anyone come down there to help you?

A Yes. This friend of mine happened to be with the --

Q What was his name?

A Richie.

Q Do you know how he got down to you?

A Yes.

Q How?

A He told me he jumped.

MR. STANZIALE: I object to what he told him.

Q Do you know? Not what he told you.

A He came off the containers.

Q Did you see him?

A No.

Q Then you don't know?

A I imagine how else could he come down.

Q Don't imagine.

MR. STANZIALE: I move that the testimony be stricken.

Q Don't imagine.

A All right.

Q If you don't know, don't say what someone else told you, you just let us know what you actually saw or heard or --

A He told me in the hospital that he came down.

Q You know that Richie was down there with you?

A After I got hurt, yes.

Q What did he do for you?

A He put a tourniquet on my leg. I was bleeding to death.

MR. STANZIALE: I move that the latter part be stricken.

THE COURT: Yes.

Q How long did you stay down there before a doctor came?

A He came right away. 15 minutes, the most.

Q Do you know how the doctor got down there?

A They told me on the ladder.

THE COURT: You can't testify to what

someone told you. You can testify to only what you saw.

Q Do you know how the doctor got down there?

A No.

Q Do you know how you got up out of this hold Of the ship?

A Yes, they put me in a thing on the pallets and with a spreader picked me up.

Q With the winch?

A Yes.

Q Where did they take you?

A On the stringpiece where the ambulance was.

Q What did you do?

A They put me in the ambulance and brought me to the Long Island College Hospital.

Q Did anybody go in the ambulance with you?

A Richie.

Q When you got to the hospital, were you admitted?

A Yes, of course.

Q Do you know what they did for you there?

A He asked me, the doctor, if he had anything to eat from the afternoon.

Q What did he do?

A They brought me to the emergency room.

Q Did they operate on you?

A They must have, that afternoon.

Q How long did you stay in the hospital?

A Nearly five months.

Q When did you get out?

A I think May 7th, the 9th.

Q While in the hospital, did the doctors visit you?

A Sure, every day.

Q Did you have an operation?

A I had three operations and one skin graft.

Q Did they put anything on your leg?

A Yes. I had a cast up to my hip.

Q How long did you have to stay in bed?

A I had to stay still for three and a half months.

Q You didn't get out of bed at all?

A No. They put a pan underneath and something else to pass your urine, a bag.

Q When finally after three and a half months were you able to get out of bed?

A It was about four months before I got out of bed. They put me in a wheelchair.

Q And wheeled you around in a chair?

A Yes.

Q When you left the hospital, Mr. Garafola, how did you leave the hospital?

A On crutches and a wheelchair. They brought me out in a wheelchair.

Q Where did you go?

A A son of mine's house in Staten Island.

Q Were you able to get around?

A I was on a wheelchair and with two crutches. When I got tired I sat in the wheelchair.

Q Mr. Garafola, how long after you got out of the hospital did you have to use the wheelchair?

A All together about seven or eight months.

Q After the hospital?

A Yes.

Q Did you also use crutches, Mr. Garafola?

A Yes.

Q One or two?

A Two crutches.

Q How long, Mr. Garafola, after you left the wheelchair did you have to use the two crutches?

A Well, the two crutches, about a year after that; and another year and a half with one crutch.

Q Mr. Garafola, did you leave your son's house?

A Yes.

Q You went to live by yourself?

A No, I went to live with another son. He wanted me for

a couple of months.

Q After that?

A A brother of mine. My brother in Long Island. I went to live with him two or three months.

Q Then, Mr. Garafola, did you move back into Brooklyn again?

A Yes. The Hotel St. George, for about four or five months.

Q While in the Hotel St. George, how did you get around?

A Two crutches.

Q When you left the Hotel St. George, where did you live?

A In the Pierrepont Hotel. About a year and a half to two years. A year and a half was the least.

Q When you lived in the Pierrepont Hotel how did you get around?

A With the crutches.

Q Did you have two or one?

A At the time, two crutches. For another seven or eight months.

Q Did there come a time when you only used one crutch?

A Yes, a couple of times I tried to walk out with no

crutches. I walked maybe half a block and had to go back and get the crutch because it hurt.

Q During all this time, Mr. Garafola, were you going back to the hospital for treatment?

A Yes, therapy treatment.

Q Mr. Garafola, did there come a time, sir, when you got along without any crutches at all?

A Then I had to use the cane.

Q Did you ever try to walk without that cane?

A No, I would never leave it. It hurts.

Q Did you try to walk without it?

A Maybe in the house, ten or fifteen steps. That's all right.

Q Mr. Garafola, what bothers you now? Which leg was that that was operated on?

A My right leg. I got noise in my ear.

Q What bothers you today about your right leg?

A What?

Q Do you have any pain?

A Pain every day, all the time.

Q What about your shoulder and your right elbow.

A Yes.

Q What about that, how does that feel?

A I can't straighten it out. (Indicating.) I can't button

my shirts, it hurts all the time.

Q What else bothers you?

A My neck. I turn my head all the time.

Q What else?

A Part of my shoulders, the neck down to the shoulder.

Q Did you say something about a buzzing in your ear?

A Day and night.

MR. STANZIALE: I ask counsel to stop leading the witness.

THE COURT: Yes.

Q Mr. Garafola, from the day of this accident, December 20, 1969, until the present date, have you returned to work?

A No, I can't work. I was on disability.

Q Mr. Garafola, prior to this accident, the year before this accident, were you working as a longshoreman?

A Yes.

Q How much did you make for the year before this accident?

A About 11 thousand dollars.

Q Two years before this accident?

A About the same.

Q Eleven thousand dollars each year?

A Yes, something like that.

I worked a lot of overtime.

MR. BUSHLOW: No further questions.

CROSS-EXAMINATION

BY MR. O'BRIEN:

Q Mr. Garafola, if you can't hear me, please let me know. Will you keep your voice up so everybody can hear you?

A All right.

Q Can you hear me?

A If you talk loud enough.

Q In the morning you loaded some drums in the hatch?

A Yes.

Q Then you came out and went to lunch?

A We got through I think 12 o'clock.

Q About one o'clock you came back in the hatch?

A Yes.

Q Now, when you came back into the hatch after lunch you went down to the lower hold of No. 2 hatch?

A Yes.

Q How did you get down?

A They got the ladder that is riveted onto the ship.

Q Permanently installed steel ladder?

A Yes, it was still open.

Q Those ladders were all right?

A Yes, they are steel ladders.

Q You had no trouble going down?

A [illegible].

Q You got --

A There was nothing in front of them then.

Q They were not blocked at that time?

A No.

Q When you went down and came down, were there any containers -- I take it you say the containers were in the wings?

A Yes.

Q Were there any containers or pallets in the lower hold at that time?

A I don't remember.

Q Well, do you remember having to climb up on top of any containers when you went down there?

A After we started loading, I don't know how many we put in.

Q When you came down through the ship's ladder where was the ladder?

A Offshore.

Q That was running down the side of the hatch?

A That's right.

Q You and the other longshoremen went down that ladder?

A Yes.

Q You went all the way down to the lower hold?

A Yes.

Q Do you remember whether you stepped off the ladder onto some containers already there or whether you stepped right onto the deck of the lower hold?

A The deck of the hold.

Q What happened next?

A They started bringing pallets and containers in. Sometimes two or three drafts of pallets, we still had the hi-lo's down there.

Q Who operated that?

A The longshoremen.

Q The hi-lo's belong to the stevedoring company?

A They were two gangs; a gang on one side and one on the other.

Q Both gangs were employed by Pittston?

A Yes.

Q As yourself?

A Yes.

Q Do you recall when the containers and pallets

came in, was it your acting hatch boss telling you where to put them?

A The gangway man, yes. Usually in every hold of a ship

Q What happened then, not usually?

You say the gangway man was acting as hatch boss.

A Yes.

Q Do you know why that was so?

A The regular hatch boss was sick, the boss of the gang.

Q You took your orders from the acting hatch boss?

A Yes.

Q He was employed by Pittston?

A Yes. What they call an extra-steady gang.

Q Can you tell me, when these containers came down and the gangway man directed where they were to be placed, were they placed side-to-side across the hatch?

A (No response.)

Q The empty containers that came down?

A When they took the hi-lo's out, there was four men on one side and four on the other. We guided them while the winchmen drove them over.

(Continued on next page.)

MP:ss
Reel2

1 Garafola-cross

BY MR. O'BRIEN:

Q You pushed these containers the last few inches into place, is that right?

A Yes.

Q And the winch man places the containers down on the deck?

A Yes.

Q What did you do, did you come up on top of the container to --

A No, other men go up on the stack of pallets and go up and they unhook it. We did that too, me and Rocko.

Q Did there come a time -- strike that.

You testified in answer to direct examination by Mr. Bushlow, Mr. Garafola, the containers were set as they are on the table here so that there was an 18 inch ledge or top of the first tier?

A 18, 2 feet, I don't remember.

Q Approximately 20 inches?

A Yes.

Q And in front of that ledge was a void, an empty space?

A Yes.

Q How high was that first tier of containers?

A 8 feet high.

Q When you were standing on the ledge you were about 8 feet above the steel deck?

A Yes.

Q Can you tell me how high the stack of pallets was?

A They made them the same level as the containers.

Q As the second tier of containers?

A Yes.

Q Another 8 feet?

A The pallets to the bottom of the ship being level with the first container, we walked on.

Q You say there were also pallets on the deck level?

A Yes.

Q How high did those pallets extend?

A About 8 feet, I think.

Q They would be up about the same height as the tier of containers?

A Yes.

Q Was there a space between that ledge and the container that was sitting on the deck.

A Yes, that was a 7 feet space. On that side we had the pallets too. Because when I fell this friend of mine pulled me against the pallets and put my head against it.

Q You say there was a 7 foot hole?

A 7 by 7. Maybe, more or less.

Q That was the hole in which you fell?

A That is true.

Q Tell me about how far you fell?

A About 13 feet.

Q About when you started to climb the pallet, how far were you from the top of the stack?

A About 10 pallets.

Q You climbed 10 pallets?

A Yes. I slipped on something and went into the hole.

Q You walked pallets before?

A Yes.

Q And pallets -- what do they do with pallets, what are pallets used for?

A You put cargo on them.

Q Cargo? All kinds of cargo?

A Yes.

Q Drums of grease, lube oil, bagged cargo?

A Yes sir. It is according. The drums we were loading were filled with black powder.

Q In your experience as a longshoreman, you have seen all kinds of cargo carried on pallets?

A Yes.

Q Pallets get pretty rough handling?

A Yes.

Q Sometimes there are cracks in the pallets?

A Yes.

Q And sometimes there are parts missing?

A Yes.

Q Sometimes there is grease and dirt on the pallets?

A Yes.

Q That is because the pallets are used to carry cargo?

A Yes.

Q The stevedore -- if you want rollers or crowbars, would you get them from your hatch boss?

A Of course.

Q Would you get ladders?

A No, the mate is supposed to give it to you on the ship.

Q Does the stevedoring outfit have a gear locker on the pier?

A What do you mean?

Q Where he keeps the crowbars and things?

A Yes, you got the man that takes care of the equipment.

Q Do they have ladders on the dock too?

A I think they do.

Q You've seen them on the docks?

A Yes.

Q Sometimes you use a ladder on the dock?

A You use a ladder when you are on the pier. On the ship you get it from the mate.

Q Do you know if your hatch boss asked the mate for the ladder?

A I told him to ask the mate.

Q What did he say to you?

MR. STANZIALE: Objection, your Honor.

THE COURT: Sustained.

Q After you asked the mate for a ladder, did he give you a ladder?

A (No response.)

Q After you asked the hatch boss for the ladder did the hatch boss send a ladder down?

A No.

Q Was there a mate there, do you know?

A No.

Q Do you know whether the acting hatch boss asked the mate for a ladder?

A I don't think so. He said "Never mind."

MR. STANZIALE: Objection to what he said.

THE COURT: Sustained.

Q After you -- how many times did you ask for a ladder?

A About three or four times. Not only me, some other fellows too.

Q How many other fellows?

A Rocko, and I heard somebody else.

Q The first time you asked the mate for a ladder, did he say anything --

A Not the mate, the gangway man.

Q Did he say anything to you?

A He said --

MR. STANZIALE: Objection.

THE COURT: Yes.

Q Did he give you an order?

A "Come on up, we are going to go out 5 o'clock."

MR. STANZIALE: Objection to what the gangway man said.

THE COURT: Sustained.

Q The gangway man gave you an order? Did you obey that order?

A I seen no ladder coming down, I was the first one to start going towards the ladder.

Q Towards the ladder?

A I mean the pallets. To use them as a ladder.

Q The second time you asked the hatch boss for a ladder, did he give you an order then?

A No. I gave him the order to put a container in that space 7 by 7.

Q Did he?

A He said never mind.

MR. STANZIALE: Objection.

THE COURT: Yes.

Q No container was put in the space?

A No, I said it four or five times.

MR. STANZIALE: I object to the question.

MR. O'BRIEN: I can lead the witness --

THE COURT: Read the question.

(Whereupon, the last question was read by the reporter.)

THE COURT: I sustain the question.

Q Mr. Garafola, when you received an order to come up to the next tier or next level in the hatch, was there any reason why you didn't climb the pallets at that time?

A I thought he would come back with a ladder.

Q In other words, you thought it was dangerous to climb the pallets?

MR. STANZIALE: I object.

THE COURT: Sustained. That is a conclusion.

Q You would have preferred a ladder?

A I ask him three or four times. Me and the boy working on my side. I told him if the ship starts moving --

THE COURT: Don't volunteer anything.

Q You testified earlier you came down using the ship's steel ladder fixed in place, is that correct?

A Yes.

Q Were these ladders blocked by 4 o'clock?

A Sure.

Q What were they blocked by?

A Before 4 o'clock, with containers and platforms.

Q Who put the containers and platforms to block the ladder?

A The gang.

Q Pittston?

A Yes.

Q Did your acting hatch boss direct that the containers and pallets be put in to block the ladders?

A I didn't hear.

Q Did your acting hatch boss direct that the containers and pallets be put in to block the ladder?

A Of course.

Q So that the longshoremen blocked the ladder?

MR. STANZIALE: Objection.

THE COURT: Overruled.

A They placed them there. There was no extra space.

Q No space between the containers to go to the ladder?

A No. From where we had the drums we had extra platforms up to that level and then they come down with containers and platforms.

Q They made the ladder inaccessible to you?

A That's right. You couldn't go up or down.

Q During the course of stevedoring operations, you don't look to the ship's officers for the ordinary every day work you do?

A I didn't get that.

Q You don't expect the ship's officers to give you orders?

A No.

Q You get that from the hatch boss?

A Of course. I was on extra labor all the time. I dont work down the hold much. Maybe 15 or 20 times in 17 and a half years.

Q You been in the hold of a ship before?

A Yes, but not many times. I was a deck man when I worked on the ship about 10 years.

Q When you asked for a ladder was the acting hatch boss looking down over the coaming at you?

A Yes.

Q He saw you?

A Yes.

Q Q He saw you standing on the ledge?

A Yes.

Q Do you know whether he saw you climb the pallets?

A He gave us orders to come up.

Q Did he order you to --

A He said come on up. I can't fly there.

Q He saw the pallets there?

A Yes.

Q Mr. Garafola, at the present time, are you able to use public transportation, buses and so on?

A Yes.

Q You go to the store?

A Yes.

Q What do you do with your time, generally?

A I watch TV, read the paper.

Q You go to any bars?

A No, I don't drink.

Q You were a professional boxer at one time?

A Yes.

Q Can you tell us some of the big names you fought?

A Harry Ebbits, Benny Leonard, Ruby Goldstein, Canada Lee.

Q How long were you a professional prizefighter?

A Near 12 years.

Q During that period of time you got hit in the face and head often?

A Of course.

Q Did you get hit about the ears?

A A little bit. Eventually you get hit in the ears.

Q You have been hit in the head and face?

A I bobbed and weaved and got less punches than some of the other fellows.

Q Were you ever knocked out?

A No, never. I slipped a few times and sometimes in the same round I knocked the guy out.

Q I believe before during the direct examination you testified when you fell from those pallets you did not hit your head?

A Of course not. But by the impact, like my brains shook and from then on I heard this noise in the ears.

Q You are not making any claim for loss of hearing, are you?

A Surely.

Q Mr. Garafola, do you recall coming to my office a number of months ago and I was there and a representative from Mr. Bushlow's office was there and another attorney was there and Mr. Stanziale was there?

A Yes.

Q You were put under oath at that time?

A Yes.

Q You were asked some questions and you gave some answers?

A Yes, some of the questions I didn't hear too good.

Q Do you recall this question, this question was put, on page 37, and I believe this question was put to you by Mr. Stanziale:

"Question: Are you making any claim for loss of hearing as a result of this incident?"

Do you recall that question, and the answer you gave was "No."

A That is a mistake. I should have said yes. It did effect my hearing. I don't say all the time, sometimes I hear good. I got the noise in my ears.

MR. O'BRIEN: You admit he signed it?

MR. BUSHLOW: Of course.

Q You read the transcript over when it was prepared

and you signed it?

A I didn't sign it.

MR. O'BRIEN: Your attorney said you signed it.

A I signed something.

MR. STANZIALE: I have to object as to any claim for the loss of hearing. It wasn't provided for in the interrogatories and no claim was made as a result of this accident.

THE COURT: That is a matter for the jury. They heard this statement that the witness made under oath. They have that before them.

Q Mr. Garafola, did you think it was dangerous to climb those pallets?

A Yes.

MR. O'BRIEN: No further questions.

THE COURT: We will take a ten minute recess at this point.

Members of the jury, you may return to the jury room for that period.

(Recess taken at this time.)

(The jury is in the jury box.)

THE COURT: You may proceed.

CROSS-EXAMINATION

BY MR. STANZIALE:

Q Mr. Garafola, when the first containers were put down in the hold of the ship in hatch number 2, where were you at that point?

A The first tier of containers? We were in shore.

Q On the containers?

A Me and Rocco.

Q How did you get onto this particular container as you testified on direct examination?

A Walked on the platform.

Q You say platform, you mean pallets?

A Yes.

Q These pallets, they were down, is that right?

A Yes.

Q And they were just as high as these containers (indicating)?

A As one container.

Q There may have been a pallet here as high as the container and you walked from the pallets onto this particular container?

A We walked over this side off shore, got onto the container and he brought the container. We hold onto the wires and the containers.

Q My questions is, how did you get onto that container, you walked from pallets onto that container?

A Yes, that was only 7 or 8 feet.

Q There were pallets on the hold of the ship about 7 or 8 feet up?

A Yes. That is done a lot down the dock.

Q You go from one pallet onto a container?

A Yes.

Q How many stacks of those 7 or 8 were there?

A I don't remember.

Q How did you get on top of the first tier of pallets?

A Climbed up on them.

Q You climbed up these pallets (indicating)?

A Yes.

Q You were on top of the first tier and they started putting the second tier in?

A Yes.

Q At one point you were down on the steel deck of the ship and at one point you climbed up on this (indicating)?

A Yes.

Q Then when you attempted to climb up on the second tier of pallets is when you met with your accident?

A That's when I asked for the ladder.

Q I didn't ask you that. When you climbed to get to the second tier of the container, you climbed the pallets and that's when you fell, during that time?

A Yes.

Q But you already climbed pallets before that day?

A Yes, but I refused to go up to the second tier.

Q Did you ask for a ladder the first time when you were on the deck to get to the pallets?

A No. That wasn't too high.

Q Mr. Garafola, please, there is no question at this point.

A I'm sorry.

Q You remember being at an examination before trial, is that correct, that took place back on June 27th, 1973 at the office of Mr. O'Brien, where I was present and we asked you various questions under oath, do you recall that?

A Yes.

Q Now, you testified I believe on direct examination as you were climbing up the second, from the first tier to the second tier, you climbed up maybe 10 of those pallets?

A That's right.

Q And you slipped?

A I slipped on something.

Q Do you know what you slipped on?

A No, I don't know.

Q These pallets, am I correct, they have boards going across?

A Yes, they are 6 feet long and 4 feet wide.

Q There are spaces in between these boards?

A Yes.

Q When the longshoremen as yourself, when you climbed up from the first tier, from the deck up to the first pallet, you put your hand and you use these pallets as a ladder (indicating)?

A Sometimes.

Q You did that that day?

A Yes.

Q From the deck to the first level?

A Yes.

Q And you put your hand in between the spaces?

A Yes.

Q You say you asked for a ladder, is that correct?

A Three or four times.

Q Rocco also asked for a ladder?

A Yes, and somebody else.

Q Do you know the name of that somebody else?

A No, I don't remember.

Q Do you know if Rocco asked for a ladder the first time when he was down on the deck?

A I don't know whether the first time. I heard it three or four times.

Q The second time around you and Rocco asked for a ladder?

A I don't remember when it was but I heard him call for a ladder.

Q It was around the same time you asked for a ladder?

A I don't know. The mate's supposed to give you a ladder.

Q You say the mate, let's talk about that. What do you mean the mate of the ship?

A Yes.

Q Is he part of Pittston?

A No.

Q He has nothing to do with Pittston?

A No.

Q The mate of the ship is supposed to --

A Yes,he's supposed to supply a ladder. Even a safety net.

Q You indicated on your direct testimony today that you fell approximately 13 feet. You climbed up about 10

of those pallets and came down and fell from the first tier and down onto here (indicating)?

A Yes. I hit the pallets with my right leg. And I hit the container hard.

* * * * *

* * * * *

Q Mr. Garafola, you say you are making a claim for your ear?

A Not my ear, my hearing. The noise in my head. I got it day and night.

Q As already testified, you were a professional fighter?

A Yes.

Q Which ear are you making a claim of loss of hearing?

A All around my head.

Q You pointed to your left ear, am I correct?

A Well, I pointed to the left, it could be over here (indicating). I had the doctor, Dr. Beck, he is the ear doctor, he put things in my ear and I heard noises here and here (indicating). But the noise in my ear don't go away.

Q In your 12 years as a professional fighter, were you ever operated on for a cauliflower ear?

A No.

Q Any treatment?

A I was operated on this, this is what they call a tin ear.

Q You also fought for the National Guard, is that right?

A Yes, I was champion three times.

Q Your professional career totalled 15 years?

A No, 11, 12 years.

Q And three years in the National Guard?

A No. All total 11 or 12 years.

Q Is it a fact you did not strike your head as a result of this accident?

A I never did.

MR. STANZIALE: Could we have the original answers to interrogatories?

MR. BUSHLOW: You can use the copies.

* * * * *

for itself.

A A month before I came out of the hospital I got the noise in the ear.

Q You swore that you read this at the time when the interrogatories were answered and you made no claim for any loss of hearing.

A I wasn't worried about the hearing, I was worried about the leg.

Q You are not making a claim for the injury to your right elbow?

A Yes.

Q Did you ever sustain any injury to your right elbow?

A A little strain once in a while, you expect that down the docks.

Q Did you ever make a claim for an injury to your right elbow before the accident?

A Yes.

Q When was that?

A I think it was 1968, I am not sure.

Q And Mr. Bushlow was your lawyer then at that time for that injury?

A Not '68, I was out 4 years, yeah, about 1968.

Q And Mr. Bushlow was your lawyer for injuries you

sustained to your right elbow?

A I think he was, yes.

Q And you were claiming you also injured your right elbow in this accident?

A My shoulder.

Q I am talking about your right elbow.

A Yes.

Q You had a prior injury to that?

A Yes, but I came back and worked the next day. It wasn't bad.

Q Do you remember any of the other members of the gang that you were working with that day besides Rocco?

A No, I don't belong to that gang, it was a colored gang and there were a couple of white guys with it. Saturday and Sundays the colored fellows don't come to work and a lot of men accept work.

MR. STANZIALE: I have no further questions.

REDIRECT EXAMINATION

BY MR. BUSHLOW:

Q This injury to your right elbow in 1968, did you lose any time from work?

A Maybe I lost a day or two.

Q Did you go back to work?

A Yes. I bathe it with hot water and it was all gone.

Q You were a fighter, did you have to stay in condition?

A Of course.

Q You did jogging and running?

A Yes. I don't smoke or nothing.

Q Before this accident what would you say was the general condition of your health?

A 100 percent.

Q Do you smoke today?

A No. I never smoked in my life.

MR. BUSHLOW: I have no further questions.

THE COURT: Is that all?

MR. STANZIALE: I have a few further questions.

RECROSS-EXAMINATION

BY MR. STANZIALE:

Q Mr. Garafola, when did you stop running and jogging? When you were a professional fighter?

A When I stop.

Q When did you stop? When did your career as a professional fighter end?

A 1936.

Q That was the last time you ran and jogged and

kept in shape?

A Yes.

Q You didn't run and jog on December 20th, 1969, did you?

A No.

Q How old were you then?

A 63. I did a lot of running on my own. What is the difference?

* * * * *

(The jury enters the courtroom.)

THE COURT: Who is the witness?

THE INTERPRETER: This gentleman, sir; I'm the interpreter.

THE COURT: Mr. Interpreter, will you raise your right hand.

(The interpreter was duly sworn.)

R O C C O M I S S U D, having been duly sworn by the Court, testified as follows through the interpreter:

DIRECT EXAMINATION

BY MR. BUSHLOW:

Q What is your address?

A 83rd Place, Brooklyn.

Q Mr. Missud, what is your occupation?

A Longshoreman, maintenance man.

Q On December 20th, 1969, what was your occupation?

A Longshoreman.

Q Do you know William Garafola, the plaintiff in this action?

A Yes, sir.

Q What was his occupation?

A Extra laborer.

Q On December 20, 1969, by whom were you employed?

A For Pittston.

Q On that day, December 20th, 1969, were you working aboard a ship?

A Yes, sir.

Q Do you remember the name of the ship?

A No.

Q Where was that ship docked?

A In Port B, 9-B.

Q Brooklyn?

A Yes, sir.

Q Was Mr. Garafola working with you that day?

A Yes, sir.

Q During the regular week, Monday, Tuesday, Wednesday, Thursday, and Friday, what was your job on the piers?

A Maintenance man.

Q Did you work on the ships on Saturdays, Sundays -- overtime?

A When there was an opportunity they gave me the probable chance to work.

Q On this day, December 20, 1969, where were you hired to work on this ship?

* * * * *

Q Was Mr. Garafola with you there?

A Yes, we were together nearby.

Q Did you get any orders to do anything at that time?

A Yes, to go up on top.

Q Who gave you those orders?

A A man who I knew as a gangway man, a man responsible for the gang.

Q When you got these orders, did you do or say anything?

A Yes, I asked, "How could I go up there?"

Q Did you ask for anything to use to go up there?

A Naturally, a ladder.

Q Did you hear anybody else ask for a ladder?

A Yes.

Q Who?

A Willie Garafola.

Q Did you get a ladder?

A No.

Q Do you know how many times you might have asked for a ladder?

A Three or four times, something like that.

Q When you didn't get a ladder, did you get any further orders from the gangway man or the man you say was

in charge of the gangway?

A Yes, the gangway man. I thought he was the one that was responsible for the gang.

Q As a result of -- Withdrawn.

Did you at any time receive any orders as to how you were to get up on the second containers?

A I asked for a ladder to go up on top.

Q When you didn't get a ladder, what were you told to do?

MR. STANZIALE: I object.

THE COURT: Reframe your question.

Q When no ladder came down, did you get any other orders as to how to get up on the top of the second container?

A I remember that the man who was responsible for the gang said we have, you know --

MR. STANZIALE: Objection.

THE COURT: Yes, he may say who he got the order from and what the position of the man was who gave him the order.

Q From whom did you get the order?

A The man who was up on deck, let's say.

Q What was that order?

A We only have a short time, a short time in which to

work. At five o'clock --

MR. STANZIALE: I object; this is not responsive to the question and is hearsay testimony.

Q What was the order he was given after he asked for the ladder and he got the ladder?

THE INTERPRETER: Are you using the first person?

Q What was the ord r that the longshoreman got?

A "Find out the best way you can to get up onto the container. Try to get up by using the pallets, because" --

MR. STANZIALE: Objection.

THE COURT: Yes.

Q After you got this order, what did you see Mr. Garafola do?

A Inasmuch as he was ahead of me, in front of me, he saw the best way possible to go up here (indicating), to get up on top.

Q Would you show us on this diagram from where Mr. Garafola was when you were there? Where did he walk to?

A (Indicating) He -- he walked along here, came close by here, and then started to climb up here (indicating).

Q How far up did he get before something happened?

* * * * *

Q What happened to him after that?

A I saw him, that he was down on the floor, with his leg broken.

* * * * *

BY MR. O'BRIEN:

Q Mr. Missud, you testified before the gangway man was responsible for the gang; is that correct?

A Yes.

Q By that, do you mean he is responsible for the safety of the men in the gang?

A Certainly.

Q He tells them when to start work, when to knock off work?

A Certainly.

Q He tells them how to do the work in the hold?

A He is responsible for us; therefore we must do whatever he tells us to do.

* * * * *

clean and in order; is that correct?

A Yes, that's what I did.

Q Now, when you were on the ship, in the No. 2 Hold, on December 20, 1969, you testified that you heard Mr. Garafola ask the gangway man for a ladder; is that correct?

A Yes.

Q How many times did Mr. Garafola ask for a ladder that you heard?

A A few times, we asked for the ladder several times because we had no possibility --

MR. STANZIALE: I object to anything after "because." I move to strike.

THE COURT: Yes.

Q Mr. Missud, did you consider it dangerous to climb that pallet?

MR. STANZIALE: Objection.

THE COURT: Yes, that calls for a conclusion. Reframe your question.

Q Mr. Missud, did the gangway man tell you to climb the pallets?

A He indicated to us how we were to go up on the pallets. That was the only possibility we had.

Q In other words, there was no other way to get

* * * * *

Q After Mr. Garafola fell, Mr. Missud, did you leave the hatch right away, or stay there for any time?

A I don't remember, maybe after a minute I tried to go out.

Q Do you recall, Mr. Missud, whether the ship's

ladders were blocked at this time?

A They certainly were. We were looking for the ladders so that we could use the ladders, but they were blocked.

Q What were they blocked by?

A With the pallets and the containers, also.

Q Who put those pallets and containers in the hatch?

A Naturally, we did.

Q Pittston, right?

A Yes, sir.

* * * * *

* * * * *

Q Now, Doctor, did you examine William Garafola, I think on November 19, 1973?

A Yes.

Q Where did you examine him?

A In my office.

Q Doctor, would you please tell us what your examination consisted of, diagnosis and your prognosis.

A The patient naturally gave me a history of how his accident occurred.

Would you like me to go through that?

He indicated on December 20, 1969, he was

working in the hold of a ship at Pier 9-B in Brooklyn, standing on a container. He was attempting to get out of the hold, when the platform on which he was standing collapsed and he fell to the steel deck approximately thirteen feet below.

He recalled blacking out momentarily, and when he revived, he was in a considerable amount of pain, especially with respect to his right leg.

He was taken from the hold, eventually, and brought to the Long Island College Hospital in Brooklyn.

MR. BUSHLOW: At this time, your Honor, I have the Long Island College Hospital records here by subpoena. May I introduce these into evidence?

MR. STANZIALE: May I see them.

(Said documents are handed to Mr. Stanziale.)

MR.STANZIALE: May it please the Court, the doctor can't continue unless he sees the records. I will look through it briefly.

A He was admitted to the hospital immediately. He indicates that bone was noticed to be protruding through the skin of his right leg.

He was prepared for surgery very quickly, and was operated upon the same day.

He indicated that he remained hospitalized through May of 1970. He had a cast applied following surgery. That cast remained on for approximately a year. It was a long leg cast, which extended from the middle of the thigh to the toes.

He remained on crutches for approximately nine months. Prior to that he was in a wheelchair for approximately six or seven months.

Following the use of crutches, he used a cane and was still using a cane when I saw him in my office.

After his discharge from the hospital, he was referred for physiotherapy to the University Hospital in Brooklyn. He had approximately fifteen treatments and was then advised that no further improvement could be expected.

He indicated to me he still had considerable amount of pain and swelling in the right ankle and that there was limitation of motion of the ankle.

He also complained of symptoms related to the right elbow, which was also intermittently painful and limited in motion.

He also had occasional pain in his neck, which he complained of following the accident.

Since the accident he also indicated that

he had buzzing in his ears, especially the left ear, and that he had been examined briefly by an ear, nose, and throat specialist but he had obtained no significant relief.

The patient stated that he takes pain killers frequently to relieve his pain, and that he also has to take sleeping pills to allow him to sleep at night frequently.

I also had the opportunity to review the records of the Long Island College Hospital and several physicians who had examined the patient over the course of approximately four years.

On reviewing these records, I found again the history that he had given as far as the nature of the accident: while in the emergency room at the Long Island College Hospital, he was given antibiotics to prevent infection, and tetanus antitoxin.

His right leg was splintered, and dressings were applied to the compound fracture of the lower tibia. The tibia is the main bone in the leg. This is the right tibia. Compound fracture: refers to the fact that the bone was protruding through the skin. If there is a fracture or break in the bone with the bone protruding through the skin, it's called a compound fracture.

X-rays were taken, which again revealed the fracture of the lower end of the right tibia and fibula,

which is the other bone in the leg, and also ossification of the Achilles tendon was noted. The Achilles tendon is the heel -- you can feel it on your ankles. For some reason this heel cord had formed bone within the substance of the tendon itself. It is a rather unusual occurrence, and is not related -- was not due to his accident. It apparently had been there for many, many years.

Other X-rays had been taken of the right shoulder, and they found that the patient had had a small, benign tumor in the shoulder, which again was not due to the accident. But no further fracture was noted in his shoulder.

The history also noted that he had at the time of the accident limited motion of the right elbow, the same limited motion which I had found, so apparently this had preceded the accident, and the limitation of motion also was apparently not due to the accident.

I examined the patient at that time -- On examination, originally, in the hospital, it was found that a large segment of skin had been evulsed, or pulled off. A large piece of skin was missing. This was the area through which the bone was protruding.

The patient was also found to have a hernia, inguinal hernia, a hernia in the right groin, which apparently was also not due to the accident.

He was also found to have a cauliflower ear, which was a result of an old boxing occupation that he had as a young man.

He also had considerable tenderness and limitation of motion of the right shoulder. That was on examination medically after his accident.

He was admitted to the hospital and open reduction was performed. This means an operation was carried out in which the fracture site was opened up, incision was made; the bone -- an attempt was made to reduce the fracture or place the fragments together, and two screws, regular screws, made of a particular type of metal, were placed in the fracture or across the fracture to hold the bony fragments together.

It was impossible to close the incision because a considerable amount of skin had been evulsed -- pulled off. What they did was to make a relaxing incision.

A second incision is made, usually in the back of the leg. This sort of relaxes the skin and allows you to pull the skin forward over the gap. This, of course, would then -- sometimes leave a bit of a gap in the back. In the front you want to have relatively normal skin. The gap that is left in the back is then covered with a skin

graft. This graft -- they did take a skin graft from his thigh. They take skin from the thigh and apply it to that area of the relaxing incision.

Following the operation, the patient was unable to urinate. They had to place a catheter, a tube, into his bladder.

The patient then had subsequent x-rays taken, and the x-rays taken following the operation revealed that the fracture had slipped. In other words, the original position that had been obtained at the time of surgery, after the screws were put in, was no longer present. It had slipped. The fragments, because of the nature of the fracture, what we call an unstable fracture -- there are many fragments -- is difficult to maintain or hold in position, so that the bony fragments had slipped out of place.

They attempted to perform another closed reduction. They put him to sleep, attempted to manipulate the fragments again to try to get back the original position, but they were unable to do so. In fact, there was a note indicating that some of the healing process that had already occurred was disturbed by the manipulation.

As of April 19, 1970, the skin was still not healed. At that time they had decided to perform

another operation to attempt to replace the fragments into a better position.

On April 20th it was noted that the donor site, in other words, the thigh, from where the skin had been taken, was not healed. The area where they had taken the skin was also unhealed.

At that time, on April 20th, the cast was removed in the hospital.

On April 22, x-rays were again taken, and still the fracture was not healed properly. It was decided to cancel the surgery which had previously been planned, probably because of the nature of the skin. You cannot operate through bad skin. If the skin is unhealed or infected, then it is very risky to operate through that kind of a wound. They decided not to.

A new cast was applied. This time a short leg cast, a cast that extends from just below the knee to the toes, previously it had extended from the thigh to the toes -- it was decided to attempt to mobilize, or obtain better motion in his ankle.

He was referred to the physiotherapy department at Down State University Hospital. He was started on crutch walking and exercise s were instituted to attempt to restore the motion in his ankle.

There was a note at that time that the patient had been complaining of buzzing in his left ear, that he had indicated that this had been present since the time of his accident. The patient then had an audiometer test, a test to determine the acuteness of his hearing. It was found that he had some hearing loss in both ears.

The patient was discharged from the hospital on May 9th, 1970, and at the time he was discharged the hospital diagnoses were as follows:

Compound fracture of the distal right tibia and fibula, evulsion of skin of the right distal fibula, contusion of the right shoulder, postoperative -- after the operation -- urinary retention with benigh prostatic hypertrophy. That means his prostate was somewhat enlarged.

Tinnitus of the left ear, which means buzzing of the left ear.

The patient at that time was under the care of a doctor Thomas Weiss. He was throughout the course of this treatment up to that point. He was subsequently seen by a consultant, Dr. Joseph Silver, who indicated in his report that the patient's ankle injury was quite severe and that he might eventually require an ankle

fusion, an operation in which a fusion -- a fusion is an operation in which a joint is stiffened, made stiff -- so that no motion is possible. The reason that procedure is done is to eliminate pain.

Following an injury to a joint, especially a fracture within a joint, the surfaces of the joint are made irregular, the joint surfaces have to be smooth in order to get normal motion, normal, painless motion. If the joint surfaces are irregular, then the mechanics of the joint are abnormal. It's like the gears of a machine. If there are stones or the gears are irregular, the machine can't function. The same thing with a joint.

What happens when the surfaces are irregular the individual develops what we call a traumatic arthritis. It means an arthritis of a joint due to an injury.

This produces pain and it produces progressive destruction of the joint. When this happens, the pain is severe. Motion is very, very limited, to begin with, so when you do the fusion you're losing very little motion, because there isn't very much to begin with, but what you do is limit the pain the patient has.

It was his feeling that this might be eventually necessary.

He had further x-rays throughout the course

of his treatment, and these eventually revealed that the fracture had healed, but that there was a progressive post-traumatic arthritis, which is what I just described to you, of the ankle joint.

That basically is the information that I received from the patient and from his records that he had previously.

Then I performed an examination which mainly was restricted to his ankle, which was the most symptomatic area.

At that time I noticed he was in no acute distress, but that he had a marked right sided limp and was using a cane.

When I examined his extremities, I found there was a healed scar over the anterior or front -- anterior aspect of the right thigh, which represented the healed donor site. In other words, that's where the skin had been taken from for the skin graft.

There was also a 4½-inch scar, which was probably due to the operative incision, on the -- anterior medial, which is the front and inner side of his right ankle, and lower leg. This apparently was due to the operative incision that had been made and possibly partly due to the skin which had been evulsed.

There was a considerable deformity noted over the end of his right tibia and fibula, the lower ends of his right tibia and fibula. He had only a few degrees of motion of the right ankle in any direction.

I say "ankle," he had only a few degrees in the subtalar joint. That is the joint that allows the foot to move up and down. The subtalar joint is another joint, a couple of inches below the ankle joint, which allows the foot to turn in and out.

Both of those motions were markedly restricted. Both of those joints were affected.

There was also tenderness when I pressed on the lower end of his tibia and fibula.

I measured his extremities and I found that the left thigh measured 14-3/4 inches in circumference, and the right thigh fourteen -- No, I'm sorry. Both thighs measured 14-3/4 inches in circumference. In other words, they were equal in measurement.

The right calf, however, measured 12½ inches in circumference and the left calf 14 inches in circumference. Now, this is an inch and a half difference. That represented what is known as atrophy, wasting of the muscles, which will occur following an injury and also following the the application of a cast. Lack of use of an extremity

causes wasting of the muscles. There was an inch and a half difference.

There was a normal range of motion of both his hips and knees, both sides.

I did an examination of his right elbow as well, but I don't know if that's pertinent here.

Then I took x-rays, x-rays of the ankle, what were called A.P. and lateral views. Those are views, films taken from the front and from the sides, so we see the ankle from two different directions.

On those x-rays, we are able to see what we call a mal -- badly -- mal united fracture. That "mal" means -- mal union means the bone did not heal properly, crooked or deformed in some way.

Q Have you those x-rays with you?

A Yes, I do.

Q Would you please show the jury the x-rays now, and the continue.

A All right.

THE COURT: Can all the jurors see?

(Said x-rays are shown on x-ray viewer to the jury.)

THE WITNESS: This is called an A.P. view, view looking from the front.

This is a lateral view, looking from the back.

The thing you might see that is very obvious, these two metal bodies in here, which are two screws, that were put in originally, you see them here and here.

There are several other things quite obvious. This larger bone is the tibia,and the smaller bone is the fibula. I think you can see fairly easily where the fibula was broken in two places, here and here (indicating).

You see this piece in the middle is tilted. It should be perfectly straight. The bone here and here, the bone is healed across, but this fragment, what we call a segmental fragment, has been tilted and is out of position.

Now, this is the least of the problem. The main problem is in the tibia and in the ankle joint.

Just in passing, let me say this large structure here (indicating)which you see, is the bony body that formed in the Achilles tendon. This is very large. Sometimes we will see calcification. This is a large one, again

not due to the injury.

The lower end of the tibia, which is this larger bone, which on this lateral view you see here (indicating), now, if I had a normal x-ray you would be able to see the difference much more easily, but this tibia is markedly deformed. This space that you see here (indicating) is the ankle joint. That space is much narrower than it should be. There should be a much wider space. When we see a narrow space, this is usually the result of some kind of an arthritis, and this is the traumatic, post traumatic arthritis which I mentioned before.

Also, this fragment of the tibia which protrudes way down here -- you see, it extends much lower in the back than it does in the front by maybe three-quarters of an inch. They should be just about on the same level; so this fragment -- it's hard to see it now because the intervening portion has healed -- has been pushed way down.

Also, there is what we call, in simple terms, a spur which has formed on the front of

this bone (indicating) which is the bone called the talus. That is the other bone that makes up the ankle joint.

The ankle joint is made up of the tibia, the bone in the leg, and the talus, which is the bone in the foot that fits into the tibia.

Now, this spur has formed. I'm sure it's as a result of injury and what it does, you see, when he attempts to bring his foot up, this hits against here (indicating), and then -- so that the foot cannot come up at all. That prevents what we call extension of the foot.

The deformity that has developed in the ankle joint, the loss of the joint space and deformity of the two bony surfaces that have to be perfectly formed to get normal motion, that in itself would obstruct motion. You can't move a square block in a round hole, and more or less this is what you have here. Basically, this is what you see. It's the deformity of the lower end of the tibia and fibula, post traumatic arthritis of the ankle joint with the two screws, as I pointed out.

Q Will you continue now, Doctor.

A My diagnosis, as far as the ankle was concerned, was a mal united compound fracture of the distal right tibia and fibula with post traumatic arthritis of the ankle joint. That, basically, is what I found.

Q Now, Doctor, assume, Doctor, that prior to December 20th, 1969, Mr. Garafola had a normal ankle and that on that day, December 20, 1969, at about -- between 4:15 and 4:30 he was caused to fall from a height of about thirteen feet onto a container and onto a steel floor, landing on his legs, would that accident be a competent, producing cause of the injury which you found?

A Yes.

Q Doctor, considering that Mr. Garafola has a limitation and restriction of motion of the ankle, from December 20, 1969 to November 19, 1973, a little over four years, have you an opinion, Doctor, whether that restriction and limitation of motion is permanent in nature?

A It definitely is.

Q Doctor, assume further that since the date of this accident, December 20, 1969, up to November 19, 1973, when you examined Mr. Garafola, he had pain in that ankle, have you an opinion, Doctor, as to whether that pain is permanent in nature?

A Yes, it is.

* * * * *

THE COURT: Yes.

Q Doctor, assume that Mr. Garafola fell a distance of thirteen feet onto a steel floor, without hitting his head, would that, Doctor, be a competent, producing cause of a disturbance in the cranial cavity?

A Yes, it certainly could.

Q Would, Doctor, would that be a competent, producing cause of buzzing and loss of hearing?

A Yes.

Q Now, Doctor, assuming that that loss of hearing and buzzing existed in Mr. Garafola from December 20, 1969, until November the 19th, 1973, when you examined him, have you an opinion as to whether the buzzing in his ears and the loss of hearing are permanent in nature?

A As I said, I think it's logical to assume that it is permanent.

MR. BUSHLOW: Thank you, Doctor.

CROSS EXAMINATION

BY MR. O'BRIEN:

Q I have only a few questions for you, Doctor. You were not the treating physician, were you, Doctor?

A No, I was not.

Q You simply examined him at the request of Mr. Bushlow for the purpose of testifying at this trial;

is that correct?

A That's correct.

Q Now, I believe you just testified that the fall that Mr. Garafola took could be a competent, producing cause of the ringing in the ears. You're aware -- Are you aware he was a professional prize fighter for a period of twelve years?

A Yes.

Q Did he testify here in court that he had been hit in the area of the face, head, and ears on numerous occasions?

A I wasn't aware of that. I assume he was.

Q Could these blows, as a prize fighter, these blows to the face and head and ears, could that have caused this tinnitus or ringing in the ears you mentioned?

A That could produce tinnitus.

Q It could?

A Yes.

Q Mr. Garafola has a bilateral hearing loss, doesn't he, neurosensory bilateral hearing loss?

A Yes.

Q Isn't this something common with aging, in its higher frequency, which I believe he has?

A That's correct.

Q You're aware Mr. Garafola is now almost sixty-eight years old?

A Yes.

Q So it wouldn't be unusual if this loss of hearing were due to his age alone, would it?

A It could be.

Q In your experience, Doctor, are most men who engage in hard manual labor retired at the age of sixty-seven, sixty-eight?

MR. BUSHLOW: I object to that question, your Honor.

MR. O'BRIEN: It's a fair one to ask the doctor.

MR. BUSHLOW: That doesn't call for an expert opinion from a doctor.

MR. O'BRIEN: The doctor would be in an excellent position to tell us.

MR. BUSHLOW: I don't know how many men over sixty-five he has treated.

Q Have you treated anybody over sixty-five years of age?

A Yes.

Q You treated many people sixty-five and over?

A Yes, I have.

Q Could you answer my last question based on your experience, then? I'm talking about people engaged in hard manual labor, sixty-five years and older. Has it been your experience they usually retire?

A Usually, I can tell you that I have men doing hard manual labor at seventy and over. To generalize -- You're asking me -- You want me to be specific about this patient? It's impossible. There's no way I could know he would be able to work at this age had this accident not occurred. I can tell you many retire, many do not.

MR. BUSHLOW: Will you let the doctor finish his explanation.

Q Go ahead.

MR. BUSHLOW: Let the doctor finish.

THE WITNESS: I'm finished.

MR. O'BRIEN: He answered,really.

MR. BUSHLOW: Thank you.

Q If Mr. Garafola desired, could he be rehabilitated to do some sort of sedentary work?

MR. BUSHLOW: If your Honor please, I object to this question. If there were not a proper foundation as to the man's education, the man's background -- I have no idea what kind of sedentary work is meant here, meaning the doctor

is in no position to give any opinion, not knowing his educational background, speech background, what training he has had before. I don't think it's fair.

MR. O'BRIEN: Let the doctor answer with those qualifications.

Q Can you? Can you answer that question from those aspects?

A I would imagine there is some kind of sedentary work that almost anybody can do that might not require any travel back and forth by public transportation, might not require standing or excessive walking.

If he were to sit all day in his home and answer a telephone, anyone can do that.

Q Doctor, Mr. Garafola has told us from the stand that he does and can use public transportation.

A I would imagine there are some forms of sedentary work he can do.

Q A man of Mr. Garafola's age, would you suspect or expect to find some fairly generalized arthritis throughout his body?

A I would say in most people sixty-seven years of age, if you x-rayed all of them, in many of them you would find certain arthritic changes, but usually they are asymptomatic,

usually they don't produce symptoms.

Q Arthritis is an aging process?

A Osteoarthritis is an aging process.

Q At about the time you're twenty-five or so it starts in?

A That's a little young.

Q It starts, just it begins; isn't that correct?

A Allegedly after the age of thirty, the tissues start to deteriorate.

MR. O'BRIEN: Thank you, Doctor.

CROSS EXAMINATION

BY MR. STANZIALE:

Q Doctor, you're familiar with the terminology, a tin ear?

A Tin ear?

Q Tin ear. That's basically a shortening of the word tinnitus that you use for the ear that Mr. Garafola has; is that correct?

A I'm not sure. I assumed it usually referred to a cauliflower type of ear. I'm really, to be honest, not familiar that it refers to buzzing in the ear.

Q Or the shortening of the word "tinnitus" to "tin ear" to use that medical terminology?

A I'm really not familiar with it in that context.

Q Doctor, let me ask you this: the type of buzzing that Mr. Garafola described to you, in your medical opinion do you feel that would be a result of his twelve years professional boxing career?

A It's possible. Now, the point is when did it start? If it started following his accident and he did not have it before, then I would have to assume it was due to that injury. If he had it during his boxing career or shortly thereafter, I would say so. His boxing career ended, I would assume, at least thirty-five years ago. If he did not have any buzzing in his ear until this accident, I don't see how you could attribute it to his fighting career.

Q Doctor, there is no testimony as to whether or not it was before or after, at this point. The question to you is, it could have been possibly as a result of a boxing career?

A I'm going by my history. The gentleman gave me a history, indicated that the buzzing in the ear started only after the accident.

Q This is what Mr. Garafola told you?

A That's correct.

Q He also told you that he had limitation of motion in his right elbow; is that correct?

A That's true.

Q This was substantive as opposed to objective findings as far as his pain in that right elbow; isn't that correct?

A What he tells me is substantive, yes.

Q You found limitation of motion in the right elbow, Doctor?

A I did.

Q Now, you know that he was involved in an accident in 1968, where he sustained some injury to that right elbow. Are you familiar with that?

A I'm aware the elbow motion was restricted prior to this injury, yes.

Q In fact, Doctor, I believe you testified on direct you felt this elbow limitation was a result of a prior injury, not related to this particular accident; is that correct?

A Yes.

Q Also, Doctor, you also said the pain in the right shoulder was found in the hospital record, benign tumor existed; that also was the result of -- not related to this particular accident?

A Yes.

Q The only injury that we're concerned that you know of, Doctor, is No. 1, the injury to the leg, the tibia

and fibula; is that correct?

A You mean that I did -- objective evidence?

Q Objective evidence of this particular accident.

A Yes.

Q Only subjective evidence is to the buzzing to the right ear; is that correct?

A That's correct.

Q Just because Mr. Garafola told you that he had no buzzing prior thereto, so you say it was related to this particular accident; is that correct?

A That's correct.

Q Doctor, you indicated on direct, information as to this particular accident the patient gave you?

A Yes.

Q Where did you examine Mr. Garafola?

A In my office.

Q Was he alone at the time or was he with Mr. Bushlow?

A No, he was alone.

Q Did you sit down and ask Mr. Garafola as to exactly how this accident happened?

A Yes, I did.

Q Isn't it a fact, Doctor, as you testified on

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AFTERNOON SESSION

2:00 p.m.

(The jury enters the courtroom.)

THE COURT: Call your next witness.

MR. BUSHLOW: If your Honor please, at this time I wish to offer into evidence the Long Island College Hospital records of William Garafola, the plaintiff.

THE COURT: Any objection?

MR. STANZIALE: No objection.

MR. O'BRIEN: No.

THE CLERK: Received in evidence as Plaintiff's Exhibit No. 1.

(So marked)

THE COURT: Call your next witness.

R I C H A R D S C O T T, having been duly sworn by the Court, testified as follows:

THE CLERK: Your address?

THE WITNESS: 97 Minna Street, Brooklyn, New York.

DIRECT EXAMINATION

BY MR. BUSHLOW:

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Q As you watched Mr. Garafola, as you testified, you saw him start to climb up the pallet?

A Yes.

Q How far up did he get before something happened?

A He got about almost to the top.

Q What happened?

A He slipped, hitting the pallet, the -- the edge of the container, fell backwards into the hold where the other pallets were.

Q You mean this (indicating)?

A Yes.

Q Come down. Show us what you did.

A (Witness leaves the stand.)

I was up here when Willie fell down here (indicating). I jumped over the coaming onto the container, jumped onto the edge of this one, and jumped down to the edge of the hold.

Q Did you think about what you were doing?

A No. (Witness resumes the stand.)

Q Just an instinctive reaction?

A Yes.

MR. STANZIALE: I'm going to object to

the term analogy.

THE COURT: What was the question?

(Record read)

THE COURT: What was the question?

MR. BUSHLOW: Was this an instinctive reaction, jumping in the containers down into the hold.

THE COURT: I will allow it.

Q When you got down there, where was Mr. Garafola lying?

A He was lying in that space there with his arm under him and the foot was almost off.

Q Bleeding?

A Yes, he was bleeding very badly.

Q How big was this space that he fell into?

A I would say about as wide as a container.

Q Did you see any portable ladders down there?

A No.

Q Did you see any safety net surrounding this hold?

A No.

Q What did you do for Mr. Garafola?

A I put my arms under him, sort of propped him against the pallets. I took my belt off, put a tourniquet on his

leg.

Q At that time did anybody else come down to that hold?

A I don't remember.

Q As you looked up, did you see anybody up above, either on the deck or around the containers?

A Cosmo was up there.

Q That's the foreman of the ship?

A Correct.

Q How long was it before someone else came down?

A Maybe about ten, fifteen minutes.

Q Who was it that came down?

A The doctor.

Q Did you see the doctor before he came down?

A Yes.

Q Did you hear the doctor ask for anything in order to get down?

A He asked for a ladder.

Q Was a ladder supplied to the doctor?

A Yes, it was.

Q Is that the first time you ever saw a portable ladder down in that hold from the time you saw Willie Garafola climbing until the doctor came down?

MR. STANZIALE: On that particular day.

A Yes.

Q On that particular day.

A Yes.

Q When the doctor got down there, what did the doctor do? What did you do?

A The doctor -- I took off the tourniquet I have. He put a rubber tourniquet on his leg. He asked for splints, two pieces of dunnage, that's wood. The doctor put it on, tied it up, turned Willie around.

Q Was this his right foot?

A Correct.

Q As you turned his foot around, did you have occasion to put his hand up against the sole of his foot?

A Yes, I did.

Q What if anything did you see on the sole of his foot and on your hands?

A He had grease on his shoe.

Q After that, what was done?

A We put him in a basket, put him on a pallet. I went up on the pallet with him, to the ambulance, went with the ambulance to the hospital.

Q You put him in a wicker basket first and then put him on one of the pallets?

A Yes.

Q The pallet was lifted by the winch on the ship and put over onto the dock?

A Yes.

Q Was there an ambulance waiting?

A Yes.

Q Was he put right into the ambulance?

A Yes.

Q He was taken to a hospital?

A Correct.

Q Did you ride in the ambulance with him?

A Yes.

Q What hospital did he go to?

A Long Island Hospital.

Q How long did you stay with him?

A About an hour.

Q Where did you go after that?

A I returned to work.

Q You worked that night until what time?

A I don't remember.

Q Do you know when you got back whether the No. 2 Hatch was working or was that finished?

A I don't remember.

MR. BUSHLOW: No further questions.

CROSS EXAMINATION

BY MR. O'BRIEN:

Q Mr. Scott, could you tell me approximately how many feet Mr. Garafola fell from the point where he fell off the pallets down onto the deck? Could you estimate that for us?

A I'd say the containers are about eight feet high -- maybe thirteen, fourteen feet.

Q That's your best estimate?

A I'd say.

Q You say that when the doctor came they put a ladder down for him. Who provided the ladder?

A That I don't know.

Q Was it one of the longshoremen who put the ladder in?

MR. STANZIALE: I object. The witness testified he didn't know.

THE COURT: He said he didn't know.

Q Do you know who physically placed the ladder in the hatch?

A The deck guys.

Q Some of the deck gang?

A Yes.

Q You don't know where they got that ladder,

do you?

A No, I don't.

Q In the course of longshoring work, Mr. Scott, you work with pallets a lot, don't you?

A Right.

Q Pallets carry all kinds of cargo, don't they?

A Yes.

Q Grease, lub oil, not unusual to find cracked and broken pallets, is it?

A No.

Q It's not usual to find pallets with grease or tallow?

A No.

Q Or other dirty substances?

A Correct.

Q The purpose of the pallet is to carry cargo?

A Right.

Q The purpose of a ladder is to climb?

A Right.

Q Do you recall the man in charge of Mr. Garafola's gang was looking down the hatch the same time you looked down into No. 2?

A No, I don't.

Q Do you recall whether he was present?

A That I don't remember.

Q Do you recall when you looked down you saw Mr. Garafola climbing the pallet just before he fell, was there anyone else climbing on the pallet behind him or next to him?

A There was Rocco, standing on the edge of the containers (indicating).

Q Standing on the ledge?

A Correct.

MR. O'BRIEN: I have no further questions.

(Continued on the next page.)

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Q You indicated in your assistance of Mr. Garafola after his fall and you were assisting the doctor, you said you noticed some grease on his shoe. I mean with all that he was bleeding profusely, Mr. Scott, you

noticed grease on Garafola's shoe, is that correct?

A It was on my hands.

Q Had you been working that day?

A Yes.

Q Had you touched anything with any grease on it at all?

A I had gloves on.

Q How about when you went down into the hatch?

A I didn't have any gloves on.

Q You didn't have gloves. You could put your hand any place at that time?

A Yes, it's possible.

Q It's possible that you had the grease on your hand when you touched it and you touched Mr. Garafola's shoe, isn't that possible, too?

A I don't know.

Q Mr. Scott, let's try to go back now. We have Mr. Garafola down, bleeding profusely. You are down there to help him and you come into this court and you testify you saw grease on his shoe. I ask you where was that grease?

A On his shoe.

Q Where on the shoe?

A On the soles of his shoe.

Q Where abouts, the right shoe, the left shoe?

A Right shoe.

Q How big was this grease?

A I don't know. It was smudged on my hand. That's all (indicating).

Q I'm not talking about your hands. I'm talking about his shoe.

A I don't know. I didn't take time to see how much grease was on the shoe.

Q Isn't it a fact, Mr. Scott, you never saw grease on the shoe because you were assisting Mr. Garafola and the doctor at that time and there was grease on your hands.

A I only had it on my hands.

Q Only on your hands, is that correct?

A On my hand.

Q You didn't see it on Mr. Garafola's shoe?

A I didn't have grease when I helped Willie.

Q I understand that. Did you see the grease on Mr. Garafola's shoe when you were assisting the doctor?

A The sole of the shoe, yes.

Q Where did you see it?

A I told you, on the sole of the shoe.

Q How much grease was there?

A I don't know. What do you mean by how much?

Q You got grease all over your hand, right?

A Right.

Q How much was on your hand at that time?

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MR. BUSHLOW: If your Honor please, that is the plaintiff's fact witnesses. But I ask his Honor to take judicial notice of the safety and health regulations.

MR. STANZIALE: You are not going to read it now?

MR. BUSHLOW: I want to read the pertinent parts to the jury now.

MR. STANZIALE: I object to that.

That's part of the charge of the case and the law of the case. This is not factual testimony as far as what took place.

THE COURT: I will allow it. I don't happen to have a copy.

MR. BUSHLOW: I will give you this copy.

THE COURT: Unless there is a quarrel about whether it is a copy. I would gather it's appropriate to read it.

MR. BUSHLOW: Thank you.

MR. STANZIALE: For clarification, are these the rules?

MR. BUSHLOW: This is 33FR11135 to amend 29CFR, Code of Federal Regulations, Part 1504, entitled "Safety and Health Regulations for Longshoring." I am going to read, your Honor, Section 1504.2, called, "Ladders," Subdivision E:

"When necessary to obtain access to or from a stowed deckload or other cargo, and no other safe means is available, ladders or steps of adequate strength and positively secured against shifting or slipping should

17 169

be furnished.

"Where portable straight ladders are used, they should be of sufficient length to extend at least thirty-six inches above the upper landing surface.

"Adequate steps formed by the cargo, itself, are acceptable when the nature of the cargo and the type of stowage permits."

Section 1504.32, Subdivision B:

"When an edge of a hatch section or of stowed cargo more than eight feet high is so exposed that it presents a danger of an employee falling, the edge should be guarded by a safety net of adequate strength to prevent injury to a falling employee or by other means, employing equal protection under the existing circumstances."

That is the plaintiff's case, your Honor.

MR. STANZIALE: May we have, prior to motions, dismissal of the jury for a five-minute recess?

THE COURT: Yes. We will have a brief recess. You may withdraw to the jury-

18

room.

(Jury leaves courtroom)

MR. O'BRIEN: Your Honor, at this time, the defendant and third-party move to dismiss the plaintiff's complaint for the failure to make out a prima facie case.

THE COURT: Have you any comment?

MR. BUSHLOW: Yes. At this time, I think we have sufficiently proven to the jury three items more of unseaworthiness: number 1, grease on a pallet; number 2, open space in the cargo, itself, creating a dangerous and hazardous condition; number 3, no ladders provided for longshoremen to get from one place to another and number 5, the failure to provide a safety net for the protection of the longshoremen while they were working above a height of eight feet.

MR. O'BRIEN: There has been no testimony about any grease on a pallet at all. There has been testimony somebody found grease on his hand and possibly on

soneone's shoe, but nothing about the pallet.

Secondly, as far as the ladder is concerned, I believe this has analogies to the Unzer case. Nothing defective with the ship, nothing wrong with the condition of the stow as such, what was wrong was it was not meant to be climbed on.

Therefore, a longshoreman's own neglect, using gear never intended for the purpose for which he tried to put it, does not put the ship unseaworthy.

MR. BUSHLOW: My reply to that is the Unzer case is thrown around this court indiscriminately. It pertains to a definite act, lifting up the neck.

We are talking about a condition, an unseaworthy condition, a hole in the cargo, no ladder, no nets, grease.

Plaintiff testifies his foot slipped. The other witnes testifies grease was on his foot. The inference can be drawn by the jury that his slipping was caused by the

grease which was on his shoe when found by the witness.

MR. O'BRIEN: There was no testimony as to grease on the pallet.

MR. BUSHLOW: He says he slipped.

MR. STANZIALE: That's all.

MR. O'BRIEN: The jury could conclude he lost his footing.

MR. BUSHLOW: Let the jury conclude that. That's a question of fact.

THE COURT: Anything else?

MR. STANZIALE: Your Honor, plaintiff's case is not geared to me. I'm a third-party defendant, but I recall there was never any testimony by the plaintiff, himself, of any stepping on any grease or of any grease on his shoe.

The first time the grease came out was this last witness, Mr. Scott, who says he had grease on his hand.

MR. BUSHLOW: He said he had grease on the shoe, too. Don't misconstrue the testimony.

THE COURT: I heard the testimony.

21

Motions are denied.

* * * * *

connection with the testimony of some of those or all of those witnesses?

A Yes.

Q Mr. Keeler, I want to give you a hypothetical question based on the testimony that has been given in this court. I want you to assume certain facts as follows: Please assume that a cargo vessel is loading No. 2 lower hold in the Port of New York.

Also, assume that drums of cargo are stowed in the wings of that No. 2 hatch, lower hold, and the containers and empty pallets are stowed in the square of the lower hold; that a part of this stow consists of a row or tier of containers seven or eight feet high, stowed from one side of the hatch square to the other. A second height or tier of containers is stowed on top of the first tier in such a manner so that there is an eighteen to twenty inch ledge con- constituted by the top of the first tier of containers.

Further, assume that empty wooden pallets are stacked one on top of the other, vertically, in a space on top of the first tier of containers and reach approximately to the height or level of the top of the second tier of containers.

Assume that there is a space approximately seven feet wide beneath this stack of empty pallets which are resting on that first tier of containers and that the distance from

the top of this stack of pallets with the deck of the lower hold is twelve to fourteen feet.

Please also assume that various of the holdmen at one time were standing on this aft ledge of the first height of containers, the eighteen to twenty inch ledge. They were directed by their supervisor to come out of that position and proceed to another sectional level of the hatch.

Assume that the vessel's ladders were blocked.

Assume that two of the holdmen asked their hatch boss for a portable ladder to get from the ledge on the containers to the top of the pallet stack.

Assume that this request was denied by the hatch boss.

Assume that the men then used the vertical face of the stacks of empty pallets to try to climb off or up from the eighteen to twenty inch ledge to the top of the second tier of containers.

Assume that the plaintiff fell while climbing on a vertical face of the empty pallets and was injured.

Now, I ask you, do you have an opinion as to whether this is a safe and workmanlike stevedoring operation, to refuse the men the ladder and expect them to climb the vertical face of the pallets? Could you tell me what your opinion is?

A Yes, I have an opinion.

Q Please give it to us with an explanation.

A To expect longshoremen to use a vertical stack of pallets to climb another eight foot, after he was up eight feet in the air with a void in back of him, so that there is no way if he slipped or fell that there was anything to catch him except the deck of the vessel, that it was not a safe or proper procedure that was being performed.

Q Mr. Keeler, who is customarily in charge of working safety in a hatch when longshoremen are loading cargo?

A The hatch boss of the gang is in charge of the safety in the immediate work areas of that hatch. The immediate working areas, there are some parts of that hatch that's not included, where men are not working. But in the hold of the vessel, on the deck where men are passing round and rigging and transmitting signals and the landing area on the area, the cargo is being transported from the string piece to its place of rest in the transmit shed, where it's being piled in the transmit shed, those are all immediate working areas.

In those areas, the hatch boss has a duty to initially inspect it for safety and he has a continuing duty to inspect it for safety as the work progresses.

Q Who employs the hatch boss?

A Who?

Q Who employs the hatch boss?

A The stevedore.

Q Are you familiar with safety and health regulations for longshoring?

A Yes, I am.

Q Mr. Keeler, I would like to show you these regulations and ask that you read the appropriate portions thereof which you believe applies to the situation we have here.

(Said document handed to witness)

THE COURT: Who prepares that, counsel?

Q Do you recognize this booklet, Mr. Keeler?

A Yes, I do.

Q Tell us what it is.

A I helped in the preparation of this booklet.

Q What is it?

A After --

Q What is this book (indicating)?

A This book, the safety and health regulations of the United States Department of Labor, concerning the safety and health of longshoremen, stevedores and related industries, such as that on water fronts, steamship businesses.

Q Would you tell us what sections apply to that?

A 1504.25. The section is entitled "Ladders."

MR. STANZIALE: If it please the Court, if these are the same sections already read to the jury, on order to safe the Court's time and repitition, then I will so concede those are the sections that were already read, unless they are different.

I see no time to waste.

MR. O'BRIEN: Your Honor, I believe the witness as an expert should be permitted to continue with his testimony, to cite which in his opinion, and not Mr. Bushlow's, applies.

MR. STANZIALE: I want to know if they are the same sections already read.

THE COURT: He is telling what he considered altogether, in that connection. It would be appropriate.

A That section, "Ladders," under subsection (c) reads as follows:

"Straight ladders of adequate strength, of such length to extend at least thirth-six inches above the cargo, and suitably secured against shifting or slipping; should be provided as necessary when fixed hold ladders do not meet requirmments of paragraph A of this section, except

that when conditions are such that a straight ladder can not be used, Jacobs ladder meeting the requirements of Section 1504.2 may be used."

Q Any other sections that apply, Mr. Keeler?

A (No response)

Q Have you read subsection E?

MR. STANZIALE: This is in your opinion.

MR. O'BRIEN: Suggest that he look at subsection E.

A In Section 1504.32, that section is entitled "Stowed Cargo and Temporary Landing Platforms." Under subsection (b) reads as follows:

"When an edge of a hatch section or of stowed cargo more than eight feet high is so exposed as to present a danger of an employee falling, the edge should be guarded by a safety net of adequate strength to prevent injury to a falling employee, or by other means providing equal protection under the existing circumstances."

Q Mr. Keeler, upon whom do those regulations apply?

A They are binding on the stevedore.

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Q Mr. Keeler, what kind of equipment is customarily kept in a stevedore's gear room on a pier?

A The stevedore's gear room is equipped with all what we call working gear, all of the working gear they have because when they come aboard, they are the experts. The ship has hired them just like the ship has hired its captain or its crew. It's hired the stevedore, the expert. It doesn't attempt to tell the stevedore when he should test

his gear, when the old gear should be thrown away, when gear should be oiled or lubricated. He leaves that to the expert. When the work progresses on the ship, the ship doesn't mean to intersperse itself between the stevedore and some men working for him as to supplying gear or anything else. So the stevedore has the working gear. The vessel has the lifting gear, which is the actual booms and winches, and that's all they supply.

Q Can you tell us what is in this gear that goes on the pier? Can you specify some of the items there?

A Mechanical gear, all of your lifting trucks, tractors, trailers, all that. That's stevedore gear. Say your bridle gear, your pallet bridle, your case straps, your heavy straps, coffee slings, flour springs, lub oil, hook -- all that lifting gear is stevedore gear.

When you talk about moving gear, you're talking about rollers, crowbars, upper lines, grease. That's all supplied by the stevedore.

When you're talking about protective equipment, that is safety shoes, gloves, hard hats, rain gear, rubber gloves for handling high energy contacts of electricity, breathing devices, carbon monoxide testers, blowers for the hatch, those are all stevedore gear. That's all operating gear.

Q How about ladders?

MR. STANZIALE: I object to the witness being led by Mr. O'Brien.

Q Are ladders included in the stevedore's gear room?

A Yes, portable ladders are included in the stevedore's gear.

MR. O'BRIEN: You may enquire.

CROSS-EXAMINATION

BY MR. STANZIALE:

Q Sir, does the ship have any ladders?

A Yes.

Q To your knowledge, does the ship have ladders?

A Yes.

Q They have portable and movable ladders as part of their equipment?

A Many ladders on a ship, yes.

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Q Mr. Keeler, remember the hypothetical question that Mr.O'Brien put to you in which he said --

A Yes, I do.

Q He said the hold and you said, "That's not a safe procedure." Would you say that condition as it existed, Mr. Keeler, was an unseaworthy condition?

A Well, unseaworthy is again a question of law.

MR. O'BRIEN: If he wants to use the word safe, I'll go along with that.

Q Was that --

MR. BUSHLOW: I'll withdraw.

Q Was that a safe condition?

A No, to climb the pallets was not a safe condition.

Q Was the hold --

MR. STANZIALE: I didn't hear the answer.

THE COURT: Read the answer.

(Read back)

MR. STANZIALE: I thought the question was referring to how the stowage was in in the hold.

Q Mr. Keeler, was the fact the stowage in this hold left a seven by seven, approximately, space in the cargo stowage, was that a safe condition?

A Yes, that's an ordinary condition. If there was no cargo to put in the hold,and ships have varying amounts of space left, until new cargo arrives, and especially when you are working on the floor of a hold, you don't give that space up. That's the last space you give up, until you know that you have all your heavy stuff, all the stuff that requires stowage on a steel deck and not on other cargo.

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Q What are the possible consequences to a longshoreman if he disobeys the orders of the hatch boss?

A A hatch boss could drop him.

MR. STANZIALE: I am going to object. There has been no testimony in this lawsuit

as far as any disobeying of the hatch boss. I see it has no relevancy in this particular trial.

MR. BUSHLOW: If your Honor please, at this time, there has been testimony that ladders were requested. No ladders were given and orders were given to climb up the pallets, "Get up to the upper level."

THE COURT: I think we had this --

MR. BUSHLOW: Except what the consequences are if the longshoreman disobeyed the hatch boss and did not go up to the upper level.

Q What would the probable consequences of that disobedience be?

A It could be that he could be dropped out of the gang That would be rather, you know, severe penalty for doing it, but it's a possibility.

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MR. O'BRIEN: The defendant rests at this point.

MR. STANZIALE: Your Honor, there are motions.

MR. BUSHLOW: Would you excuse the jury, your Honor? They want to make certain motions.

THE COURT: Yes. You may withdraw for the time being, members of the jury.

(Jury leaves courtroom)

MR. O'BRIEN: I think we are finished for the day, your Honor.

THE COURT: Seat the jury.

(Jury re-enters courtroom)

THE COURT: You are now excused until tomorrow morning at ten o'clock.

Do not discuss the case meanwhile. I hope the weather is more appropriate than it was at noontime.

You may go until that time.

(Jury leaves courtroom)

MR. O'BRIEN: Your Honor, at this time, the defendant renews its motion made at the end of the plaintiff's case to dismiss the plaintiff's complaint for failure to make out a prima facie case, also moves for a directed verdict against the plaintiff's

complaint.

THE COURT: Denied.

MR. BUSHLOW: The plaintiff moves for a directed verdict against the defendant.

THE COURT: That's quite a motion. I think I will deny the motion.

MR. BUSHLOW: Thank you, your Honor.

THE COURT: You have leave to make it at a later time.

MR. BUSHLOW: Thank you, your Honor.

MR. STANZIALE: At this time, the third-party defendant moves to dismiss the the third-party plaintiff's complaint against the defendant, Pittston Stevedoring, for failure to make out a prima facie case.

THE COURT: Motion denied.

MR. STANZIALE: At this time, the third-party defendant requires adjournment until tomorrow at ten o'clock.

THE COURT: That's appropriate. How many witnesses do you have?

MR. STANZIALE: Four, your Honor.

THE COURT: Ten o'clock tomorrow morning.

(Time noted: 3:45 P. M.)

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52a

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Q What did John Smith say to you and you to him?

A Well, at the time when John Smith first came to me, about four o'clock, he asked me "How are the men going to get out of the lower hold" and I told him "There is a ladder in that hatch. The men have to come out by the ladder." Now, he told me there was no ladder in the hatch and I told John Smith, which I hollered at him, "You know there should be a ladder in the hatch all the time. Get a ladder and put a ladder in that hatch right away."

Q When was the next time that you had a conversation with John Smith about ladders?

A When the doctor was going into the hatch. When Willie got hurt.

Q When Willie got hurt did you see the accident?

A No.

Q How did you hear about it?

A John Smith come and told me that Willie had got hurt

53a

in the hatch.

Q Did you walk over to number 2 hatch?

A Yes.

Q Did you look down?

A Yes.

Q Where did you see Mr. Garafola?

A I seen him laying on the deck on the port side of the ship with Richie.

Richie was leaning over him and I hollered down to Richie "Put a tourniquet on his leg." He was bleeding very badly and Richie took his belt off and applied the tourniquet to his leg.

Q Was there a ladder in the hatch at that time?

A No, Smith didn't bring it yet and I blew my top again.

Q Did the medical man arrive?

A The ambulance arrived with a doctor. We wanted to put the doctor down the hold with a pallet.

Q By that you mean you wanted to put the doctor on one of these pallets and lower him down into the hold?

A Yes sir.

Q What did the doctor say to that?

A He refused to go.

Q Did the doctor finally go down the hold?

54a

A Yes sir.

In the meantime, we had a 40 foot ladder and put it down and the only way the doctor went down was we had a longshoreman go first and the doctor following him down. I will never forget that doctor.

Q Can you describe him to us?

A Yes. He was short and had black coat with a fur collar. He wouldn't go in the hatch no way.

Q Was there any ship ladder he could have used to go down?

A The escape hatches were blocked by cargo.

MR. BUSHLOW: No further questions.

CROSS EXAMINATION

BY MR. O'BRIEN:

Q Mr. Panacio, you testified that Mr. Smith told you there was no ladder in the hatch and I believe you said there should have been one there all day; correct?

A That's right.

MR. STANZIALE: Objection, your Honor. That wasn't the testimony.

MR. O'BRIEN: I believe it was.

MR. STANZIALE: Objection withdrawn.

Q Did Mr. Smith then put a ladder in the hatch?

55a

A Well, when I arrived on deck, when I looked down the hold and when Willie was hurt the ladder wasn't there yet.

Q Is it customary to have a portable ladder in the hatch when they load cargo, the type you testified about?

A Yes.

Q Whose responsibility is it to see the ladder is in the hatch?

A Well, I check the hatch. If there is no ladder I tell the hatch boss "Pick up a ladder and put it in the hatch" and it's his duty.

Q Pittston's hatch boss' obligation or duty to see the ladder is in the hatch?

A Yes.

Q When they finally did put a ladder in for the doctor, do you know where they got the ladder?

A From the gear room.

Q The stevedore's gear room?

A Yes sir.

Q You said the escape hatch ladders were blocked -- with cargo loaded by Pittston?

A Yes sir.

MR. O'BRIEN: Nothing further.

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74a

THE COURT: Yes, but to save time --

MR. STANZIALE: I am trying, your Honor.

THE COURT: Members of the jury, you may withdraw temporarily.

(Jury excused at 2:45 p.m.)

(Recess taken)

(Jury entered jury box at 3:35 p.m.)

MR. STANZIALE: I call Doctor Thomas Weiss.

D O C T O R T H O M A S O R R I N W E I S S, having first been duly sworn by the Judge of the Court took the witness stand and testified as follows:

THE CLERK: State your full name, please.

THE WITNESS: Thomas Orrin Weiss.

DIRECT EXAMINATION

BY MR. STANZIALE:

Q Doctor Weiss, were you the treating physician for William Garafola wherein Mr. Garafola sustained an injury December 20, 1997?

A Yes.

Q Doctor, can you please give us your qualifications, training and education?

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83a

your Honor.

Q Were you the doctor who performed the operation on Mr. Garafola?

A Yes.

Q On William Garafola, doctor?

A Yes.

Q And also, were you the doctor who treated Mr. Garafola for a period of time?

A Yes.

Q And from your records, doctor -- did you bring records with you?

A Yes.

Q Can you look at your records, doctor?

(pause)

Q Don't go to your records, doctor.

Can you tell me how long, approximately, you treated and rendered professional care and service to William Garafola -- approximately, doctor?

A I have the last report here, if I can find it.

At least, until 2/24/71. That isthe month readily available.

Q Approximately two years; a year and a half?

A Year and a half.

Q During that year and a half, doctor, did

84a

Mr. Garafola ever give you a different statement as to how the accident happened?

A The last report was rendered 6/16/71 and the last visit was 6/15/71/.

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86a

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Q Doctor, when you saw Mr. Garafola for the first time, how soon after his admittance was that?

A I can't tell you exactly. It was within a few minutes of his admission to the emergency room.

Q At that time he had not been operated on yet,

87a

had he?

A No sir.

Q At that time you looked at his leg; is that right?

A Yes.

Q It was a compound comminuted fracture?

A Yes.

Q A bad leg?

A Yes.

Q Pain?

A Yes.

Q Real pain?

A Yes.

Q That is the time you took a history from him; is that right?

A That is correct.

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103a

MR. STANZIALE: Iobject. It has been testified as to what was done by Doctor Weiss.

MR. BUSHLOW: I withdraw the question. Nothing further.

MR. O'BRIEN: I have no questions.

THE COURT: You may step down.

MR. BUSHLOW: That is the plaintiff's case.

MR. O'BRIEN: The defendant rests.

MR. STANZIALE: Pittston Stevedoring Company rests, your Honor.

THE COURT: Members of this jury, this, as you may have observed, concludes the presentation of the evidence so that tomorrow morning the lawyers will sum up and state their positions in the case and the Court will charge the jury.

You may now go until ten o'clock tomorrow morning and do not discuss the case as I have admonished you.

(Jury excused at 4:15 p.m.)

MR. BUSHLOW: If your Honor please, the plaintiff makes a motion for a directed

verdict on the following grounds:

It has been proven and not contradicted that there was no ladder in this hold for the use of the longshoremen.

It has been proven and not contradicted that at times longshoremen use pallets in order to obtain their place of work and the rules and regulations of safety and health say that cargo can be used as a ladder providing it is adequate for the purpose.

It has been proven, your Honor, that the containers -- and not seriously contradicted -- is 8 feet in height and that the plaintiff fell a distance of about 13 feet and the rules and regulations provide when there is a crew working 8 feet or higher there should be a safety net.

I think your Honor, it is a logical inference and the plaintiff testified he put his right foot on the pallet and slipped. He doesn't know what he slipped on because down he went but the witness jumping down within a matter of seconds thereafter, and while helping the doctor place the patient in

a basket on the pallet and placing the splint on the plaintiff, the witness noticed grease and I think there was grease on the pallet. I think it would be a reasonably drawn inference that there was grease on the pallet.

I think there were unseaworthy conditions on this ship and regardless by whom created, the defendant is chargeable therewith and the Court should grant a directed verdict on the grounds of liability against the ship.

r4 MR. O'BRIEN: Do you want me to make my motions or answer that?

THE COURT: Whatever you wish to state.

MR. O'BRIEN: As to Mr. Bushlow's motion, I believe it should be denied for the following reasons:

As far as the grease goes, there is no proof there was grease on that pallet.

Further, the testimony has been that pallets are used to carry greasy materials and the men know this and they know why they are not suitable for climbing and why the

ladder was asked for.

As far as the 8 foot net, I think Mr. Keller (phonetic) testified it is impracticable to use nets in hatches under those circumstances. You can only use a net when you have a fixed case of cargo completed and that was not so here.

As far as the ladder goes, the responsibility would be on the third party defendant Stevedore, without question, but I don't believe the absence of the ladder renders the vessel unseaworthy.

MR. STANZIALE: It has been the third party defendant's position that the accident did not happen in the manner in which the plaintiff testified and I have raised issues of fact for the jury by admissions against interest of statements made by the plaintiff to the treating doctor and doctor on behalf of Pittston Stevedoring Company and with those fact questions raised I urge this is a fact question for the jury and the plaintiff's motion for a directed verdict be denied.

THE COURT: This matter of directed verdict, I haven't heard of many.

I deny the motion.

MR. O'BRIEN: At this time, the defendant and third party plaintiff renews the motions made previously and moves for a directed verdict against Pittston Stevedoring.

THE COURT: Denied.

MR. STANZIALE: The defendant moves to dismiss the third party complaint against Pittston Stevedoring.

THE COURT: Denied.

Ten o'clock tomorrow morning, gentlemen.

(Court adjourned for the day)

3b

THE COURT: Ready to proceed?

MR. BUSHLOW: Yes, your Honor.

MR. O'BRIEN: Yes, your Honor.

MR. BUSHLOW: If your Honor please, at this time the plaintiff moves that the pleadings conform to the proof in evidence as has been submitted on this trial.

THE COURT: Motion is granted.

Are you ready to proceed now?

MR. BUSHLOW: Yes.

May I ask the Court, when the Court charges "reasonable man" that it make it "reasonable longshoreman."

MR. O'BRIEN: As far as the charge goes may I ask the Court to charge if the jury finds contributory negligence, that the negligence is imputable to Pittston and based on that negligence alone, the shipowner is entitled to indemnity from Pittston.

MR. STANZIALE: I object to that.

If the jury believes the testimory of the doctor as far as that Mr. Garafola pulled the wire and slipped and fell which would be an accident resulting out of his acts, how can

4b

that be attributed to his employer as to stowage and/or providing equipment.

MR. O'BRIEN: That is in requests four and nine in my charge, as against the third party claim; Mortinsen v. Glittre, a second circuit case --

THE COURT: Would you find it in here for me, please?

MR. O'BRIEN: Surely, your Honor.

(pause)

MR. O'BRIEN: Here it is.

In fact, there are two circuit cases. There is another one by the name of McLaughlin v. Treilleborge .

THE COURT: That is four and nine --

MR. O'BRIEN: My requests for the indemnity action toward the back --

THE COURT: Yes. I will so charge.

MR. O'BRIEN: I also ask your Honor --

MR. STANZIALE: I accept to the Court's ruling on that question.

MR. O'BRIEN: I ask the Court to charge in connection with my supplemental request to charge, Provenso v. Mensforth Lines.

5b

THE COURT: Where is that?

MR. O'BRIEN: It is one charge.

I ask your Honor to charge in line with that supplementary request as to the indemnity action regarding the longshoremen and harbor safety regulations that the Court charge, if the jury finds there was evidence that the regulation was violated they may consider that as some evidence that Pittston has violated its warranty to the defendant shipowner, to perform work in a safe manner.

MR. BUSHLOW: All counsel has seen and read the special verdict questions and on behalf of the plaintiff I consent to these questions being submitted to the jury.

MR. O'BRIEN: The defendant consents to those special interrogatories to the jury.

MR. STANZIALE: No objection, your Honor.

THE COURT: Very well.

Bring in the jury.

(Jury entered jury box at 10:20 a.m.)

THE COURT: Good morning members of the jury.

You may proceed, counsel.

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40b

MR. O'BRIEN: If the Court please, members of the jury, Mr. Bushlow, Mr. Stanziale:

Mr. Stanziale has already covered the preliminaries as far as your using your common sense and that you are the judges of the facts and that what the lawyers say now on summation, is not evidence but merely our views.

If anything we say conflicts with your recollection it is your recollection of the facts that govern and not ours.

Now, at the opening of this trial when I spoke to you briefly and I will speak to you briefly now too because I don't like being long-winded, I said there were three parties in this action. I want to make that clear to you; who they are and how they stack up.

There is Mr. Garafola, the plaintiff, claiming he was injured on our ship so he sues my client, the shipowner.

Now, if you find that there was something unseaworthy about that ship and I cannot go into the question of unseaworthiness because that is the province of the Court, but the

41b

Court will explain, if you find the ship unseaworthy and that Mr. Garafola was injured because of that, then I say the unseaworthiness was not caused by the ship but by the third party defendant Pittston and therefore, my client has sued Pittston saying that if you find damages against the ship for Mr. Garafola then you might find damages in favor of the ship against the stevedore because they created the condition, if you find negligence. I hope it is clear, It is confusing to lawyers and it can be mighty confusing to laymen. However, the Court will charge on that in detail. Plaintiff is against me and I am against Pittston because I say it was Pittston's fault and if we have to pay they should pay us back everything. We hired Pittston as the expert. I mentioned that in my opening also.

Now, Mr. Keeler testified that stevedoring is a field of great expertise. There is involved machinery and techniques involved and the ship does not do its own stevedoring work. It brings the cargo across the ocean

42b

and once into port the ship's officers work is done and the seamen's work is done and we hired the stevedores because they hold themselves out as experts in the field and they warrant to us they will perform their work in a safe and workmanlike manner.

In this case if you find for Mr. Garafola it is because the stevedore didn't perform its work in a safe and workmanlike manner and therefore it is liable to us for anything you find in Mr. Garafola's favor.

Actually, the trial was primarily a battle between Mr. Bushlow and Mr. Stanziale. I was kind of in the fox hole there. That is because the ship was not involved. There is no testimony that a ship's officer or any crew member was in the area of number 2 hatch, let alone in the hatch. There was no testimony the ship was involved in stevedoring and that is proper. We are not involved in it. We turn the deck area, hatch, over to the stevedore. There is the cargo or the cargo on the pier. There is the hatch. You load the ship, Mr. Stevedore. That's it. We pay you for that.

43b

Now, as far as the accident itself, as Mr. Stanziale pointed out, there are several possibilities or several stories as to what happened.

You have got the testimony of Doctor Weiss who saw plaintiff, apparently within an hour or less than an hour after the accident occurred and plaintiff told him that while pulling a wire he fell or he fell off a container while pulling a wire.

Then, several months later, six or seven months later, he saw Doctor Silver who examined him and Doctor Silver states that Mr. Garafola told him he fell off a container and then there is another report saying he fell off a platform or a platform collapsed and then you have his testimony that he was climbing. Now, which one of those four stories is true, is your decision. You decide that. I am not going to comment on it. Mr. Stanziale covered it quite well and I wouldn't take a lot of time to do that.

Let's go to plaintiff's testimony though. He testified in the morning they had

44b

loaded wings, that is the sides, of the number 2 hatch with drums of cargo. It doesn't matter what was in the drums. They are just drums that leave the square of the hatch empty.

They had the empty containers and pallets on the pier, preparing cargo to be returned to Europe or whatever so they decided to fill up the square of the lower hold with the containers and pallets.

Mr. Garafola came back from lunch at about one o'clock, he said and he went down, what he termed a sturdy steel ladder welded or bolted in place. It is sometimes called an escape ladder. He and his men went down. They started to load containers and pallets and gradually they blocked the ladder.

Then, we have a situation demonstrated here with these little mock-ups (indicating) so, they had a tier of containers and pallets and a second tier 18 or 20 inches wide on the top of the first tier and he and Mr. Masud were working there and he further

45b

testified that his hatch boss said "Come up to the next level or tier" -- I forget if it was level or tier.

Mr. Garafola testified that he then called for a ladder. He testified that he called for a ladder several times. I think he said two or three, maybe four times and Mr. Masud testified they were on the ledge and he yelled for a ladder several times and the hatch boss said "Never mind the ladder" -- words to that effect -- "We are going to knock off soon. Find the best way up or climb the pallets."

Now, Garafola and Masud must have known they should not have climbed the pallets or they wouldn't have asked for a ladder but in any event, their testimony was they were ordered up and had no choice about it.

Mr. Garafola starts to climb up, gets up 10 or 12 pallets and falls 12 feet because beneath the pallets there wasn't anything. He went down to the steel deck.

Now, to comment on this bit about everyone climbs pallets: Not everyone climbs pallets

46b

and just because everyone does do something does not make it safe or right. You can do something unsafe a dozen times and get away with it and the 13th time you find out how unsafe it is and that is the situation with regard to climbing the vertical stack of pallets which extends about 12 or so feet above the steel deck. They climb pallets but it is dangerous and they should not do it and because it is done does not make it undangerous or safe. This is the time Mr. Garafola got caught, so to speak. He didn't get away it.

I also mentioned that Mr. Garafola himself -- and I said this on the opening -- has a duty or responsibility of his own for his safety. You just cannot go around ambling inany direction and say "Whatever happens to me I will blame someone else." It is for you to decide whether he violated the duty he owes himself. Whether that violation was zero or a hundred percent or some degree in there, that is for you to decide.

Mr. Masud as I recall, testified it was

47b

not proper procedure to climb pallets and Mr. Panacio said he never has and the inference from that is that it is obviously not proper. Perhaps that is why Mr. Panacio is a foreman, as Mr. Stanziale said -- because he obeyed the rules.

Now, Mr. Scott, I don't have much to say about Mr. Scott. He testified he was an eye witness to what happened and it is up to you as the jury to evaluate his testimony.

It is quite a coincidence that Mr. Scott was there but certainly not improbable or impossible that he was there.

You have Mr. Scott's testimony. He said that when he went down, jumped down and was attending Mr. Garafola he noticed grease on the shoe. There is no proof where it came from. You may infer it came from the steel deck of the ship in the hatch, from the pallets or someplace else.

In any event, there was testimony here from the longshoremen testifying who all agreed that pallets were not for climbing and the reason for this is that pallets were used to carry cargo.

48b

They receive rough handling, are knocked around, banged around, lifted on slings and bridles and thrown down and they have cracked boards, missing boards, split boards. They may have grease on them or lube oil from leaking drums or tallow or almost anything. Pallets are not made for climbing. Ladders are for climbing.

Mr. Garafola was trying to take pallets and put them to a use for which they were not intended. Even if everyone else climbs them that is not their purpose. The thing for climbing is a ladder and he requested a ladder and Mr. Masud requested a ladder and it was denied.

Mr. Smith contradicts Mr. Garafola and Mr. Masud. He said "No, nobody requested a ladder of me and I didn't tell them to come up the pallets." It is for you to evaluate the credibility or truth of Mr. Smith as opposed to the plaintiff.

Mr. Smith is an experienced man. He had been a hatch boss. He was on the docks for many years and although he contradicted

49b

Mr. Garafola and Mr. Masud's testimony about requesting a ladder at that particular time, Mr. Smith did admit that if a ladder had been asked for he would have ordered one from the dock. The stevedoring company has ladders on the dock. Mr. Panacio also said that the stevedore has ladders on the dock.

In fact, Mr. Panacio said that some ships have portable ladders and some don't. They don't know. So, they have their own ladders on the docks, as it should be, since they are hired to do the work and they supply their equipment. They have control of the work. They know what equipment they need and Mr. Smith did admit that if a ladder were necessary he would have gotten one from the dock. All this again, is within Pittston's control, the stevedore and not the ship.

Mr. Smith also said that the safety of the men was his direct responsibility and one of his primary concerns and there again it is the stevedore's control and management over the gang of men and the control of the work and the operations.

50b

Now, as to Mr. Panacio, and I have touched upon him, he testified he had somewhat of an argument with Mr. Smith about the ladder and went as far as to say there should always be a ladder in the hatch when men are working. This is the stevedoring foreman, the man in charge of the entire stevedoring operation on that ship, Mr. Panacio.

Mr. Panacio testified that a ladder should always be in the hatch but there was no ladder in the hatch where Mr. Garafola was or he certainly would have used it. He asked for one, he testified.

Mr. Panacio also told us when a doctor came aboard a ship after Mr. Garafola had fallen they got a 40 foot ladder from the dock, the stevedore's gear room, Pittston's gear room -- no trouble -- got it in the hatch and the doctor went down. Why not do that in the beginning when Mr. Garafola asked for a ladder, if he asked for a ladder and that is for you to decide -- just who is telling what truth.

51b

Mr. Keeler is what is known as an expert witness. You heard his qualifications and I brought him in to explain certain things, what proper practice and procedure in stevedoring work was.

Mr. Keeler has been involved with stevedoring and shipping since 1931. He started as an ordinary seaman, worked up the hard way. He is not one of those guys who was a book man or started from the middle. He has worked as a longshoreman, hatch boss, foreman, superintendent and a number of other things.

You recall a hypothetical question I read to him, that long question. I had to write it out so I could make sure I had everything in there testified to but if I left something out it could have been objected to so I wrote it out. We had the little model set up here (indicating) and I am not going to set it up again. He testified under the circumstances existing, based on the testimony from the witnesses that the refusal of a ladder for Mr. Garafola and in order for him to come up a vertical stack of pallets was poor or unsafe

52b

stevedoring procedure. He said there should have been a ladder available and it is the stevedore's obligation to supply a ladder. The stevedore is in control of the operation. The ship does not have anything to do with it.

Mr. Keeler also read some safety regulations and I believe the Court has taken judicial notice of these regulations and I will read them. I hope I won't bore you.

These are put out by the United States Department of Labor and these I will read from are dated May, 1967, and they were in effect, December, 1967 and this is what is a compilation of what is considered to be good stevedoring practice; the rules and regulations the stevedore should follow.

First, I will read about the scope and responsibility and then I will read that one specific section again on ladders.

The title of this is Safety and Health Regulations for Longshoring, Title 29 of the Code of Federal Regulations, Section 1504 point 2, Scope and Responsibility, subsection A:

53b

"The responsibility for compliance with the regulations of this part is placed upon employers as defined in section 1504 point 3 sub paragraph C."

What does 1504 point 3 sub paragraph C say:

"The term employer means an employer any of whose employees are employed in whole or part in longshoring operations or related employment as defined herein within federal jurisdiction on the navigable waters of the United States." -- Pittston Stevedoring.

Subsection I:

"The term longshoring means loading, unloading, moving or handling of cargo, ships stores, gear, either into, in or on any vessel on the navigable waters of the United States."

Section 1504 point 25 sub paragraph E:

"When necessary to obtain access to or from or a stowed deck load or other cargo and no other safe means is available, ladders or steps of adequate strength and secure

54b

against shifting or slipping shall be furnished.

"Where portable straight ladders are used they shall extend at least 36 inches above the upper landing surface."

To recapitulate, in two or three minutes, the concensus of opinion was that pallets were not for climbing. I asked the men that and I asked about how they got dirty and banged around and splintered. They are not useable. The proper thing for climbing is a ladder and therefore, Mr. Garafola was putting something to a use for which it was not intended.

All the longshoremen agree, including Mr. Panacio, that ladders were available on the pier from a stevedore's gear room. In fact, it was proven by the fact they got one for the doctor with no trouble.

Based on Mr. Panacio's testimony, I'd say through him alone, it is almost an admission that Pittston violated safe practice because he said there always had to be a ladder in a hatch and there clearly was not one, from what we know, based on the testimony, in number 2

55b

hatch on December 20th, 1969 at about 4:15 or 4:30 in the afternoon.

It is pretty clear from the testimony that the responsibility for the safe conduct for stevedoring work rests on the stevedore and there was no proof of any ship involvement at all. No one went looking for a mate or seaman. Nobody testified there was a mate or seaman around and there was no reason for one to be around. They were not involved in this kind of work. This is why the stevedore is hired. They control their own men and have their own boss.

So, I ask you when you go into the jury room after Mr. Bushlow finishes summing up and his Honor charges you, look at all the testimony, consider all the evidence, use your common sense as to what happened here and who is to blame.

If you find for the plaintiff against me then based upon the testimony you should find in my favor over and against the stevedore.

I do not say find for the plaintiff. He has got three or four stories that have come

56b

out as to how this happened. Maybe he was negligent himself. That is for you to decide. You consider that. I just mention this. Look at it, buy it if you want, discard if you don't want it.

Thank you very much and I know when you go inside you will come out with a just and fair verdict.

Thank you.

THE COURT: We will take a five minute recess.

(Recess taken)

(Jury entered jury box at 11:40 a.m.)

(continued on next page)

57b

MR. BUSHLOW: If your Honor please, Mr. Stanziale, Mr. O'Brien, Mr. Foreman and ladies and gentlemen of the jury:

First, may I thank you for the attention that you have displayed during this rather prolonged trial. We were in and out and had a lot of delays but that cannot be helped.

Before I go into my closing address, as I told you at the beginning that I would again speak to you when the case was over, let me just make a few pertinent remarks as to what Mr. Stanziale took 45 minutes to tell you.

He says that Mr. Garafola told Doctor Weiss one thing, told Doctor Silver something else and even in the hospital record which you will have, when he first came into the emergency room.

There is someone in the emergency room who says to the poor man "What happened?" Now, whether Mr. Garafola answered or not it doesn't say. It doesn't say "Mr. Garafola said this" because he was there with someone else.

58b

What is the condition of this man when brought into the emergency room? He has got his ankle, his foot hanging by a thread. Both bones -- in the front, it is the tibia and there is a little bone behind it called the fibula -- have broken and are sticking out of the skin and there is nothing holding that ankle and the doctor says to him "I am not going to treat you until you tell me what happened."

I ask you, what difference does it make if the man fell 40 feet or 10 feet? Here is the ankle. Take care of the man's ankle. This man is yelling "My God, My God, help me. Don't ask me what happened."

Then he goes to Doctor Silver, 8, 9 months later, still on crutches and I don't know if any of you ladies and gentlemen -- I hope you have not had occasion to go to a busy specialist who is talking to you, is on the phone and is telling his assistant to take an x-ray, all at the same time. What does he know of hatches and pallets? He hears "containers" and he says "All right, a container."

59b

I say this accident happened the way Mr. Garafola and Rocco said it happened.

Now, Mr. Stanziale said "I am going to prove to you by the hatch boss, Mr. Smith, that these people never asked for a ladder; that Mr. Smith never heard that, never said anything about a ladder."

Well, I knew what Mr. Smith was going to testify to. He told me. Therefore, I went to the only other man who would know something about that, that is Mr. Smith's boss and I subpoenaed him.

Now, when my man served Cosmo with the subpoena I said "Have him call me so I can talk to him." I can't run down to the pier. I am working here. I have obligations.

He calls me and pier 9 is right here on Columbia Street and I said "Would you do me a favor and come to my office? I want to talk to you about Mr. Garafola" and when I spoke to him and asked him what do you know about this and he told me I said "Would you come to court tomorrow? You have my subpoena" and he said "Yes."

60b

Now, Mr. Stanziale told me he would not be ready until two o'clock so I said "Mr. Cosmo, you need not take off your job until two o'clock because Mr Stanziale still has other witnesses to put on the stand" and he was here and he testified.

Now, Mr. Stanziale tells you about Mr. Smith. Mr. Smith is a fine gentleman. He has spent a lot of time on the waterfront. He has had some very important positions. He was a hatch boss and then he became a gangway man, a little more than a hatch boss. He has a lot of experience on the waterfront.

Mr. Smith meant no harm to Mr. Garafola. Believe me, he didn't. He didn't want to see that man hurt. But here it is close to quiting time "Fellows, let's get off the vessel" and he asked for a ladder.

To get a ladder you call down to the men on the docks. They go over to the gear room, get the man to unlock the room, bring the ladder up, get it up with the winches and get it to the men. He says "Come on fellows. We're knocking off. Let's go home."

61b

Mr. Garafola isn't really a hold man all the time. You heard him testify he is extra labor for work on the docks, trucks. He takes cargo from trucks, puts it on the pier or takes the cargo from the pier and puts it on the trucks.

You heard him testify that he finished a week's work and he says "I'd like to make a little extra money" and he goes to the hall and makes himself available for Saturday. He wants to earn a living. He wants to support himself. He is not a lazy man. He wants to work.

Now, Mr. Smith, made a lot of statements. He made a statement every time someone came to him and you will have these statements and you can read them.

Mr. Smith is employed by Pittston and you talk about an interested witness -- he has got a nice job with Pittston. Pittston is his employer. He doesn't want to hurt Mr. Garafola. I assure you he does not. They are brothers under the skin. They both work with the sweat of their brow to earn a living and I say to you

62b

that this longshoring is the most hazardous occupation in the world. That is why there are rules and regulations. You take your life in your hands when you walk on those vessels; 15 ton containers coming down, machinery coming down, grease, pallets, containers, oil drums -- a tremendously hazardous occupation and Mr. Smith doesn't want to hurt Mr. Garafola.

However, on December 27, 1971, about a year or two years after the accident, Mr. Smith signed a statement and says "I do not recall" -- that means he doesn't remember -- "If the hatch ladder was covered by the stowage and I do not know if the longshoreman were using the tiers of pallets as a ladder because of the stowage condition." This is December 27, 1971.

Well, this case is coming up for trial soon and they say "That's not good enough. That's going to show the ladders downstairs in the hatch were blocked. How are these people going to get up? We'd better see Mr. Smith again."

So, they see Mr. Smith again, February 16,

63b

72, only two months later when somebody in the office of Pittston read this and said "This isn't good enough. Go back and see Smith." Now, listen to what he says, among other things: "Also, none of the members of the gang needed a ladder to leave the hatch as the hatch ladders were clear and available." Is that the same thing? Mr. Smith is trying to be helpful to his employer.

What did Cosmo say about Mr. Smith? Cosmo says that around four o'clock, 4:15 -- and they knew they were only working until five o'clock. They were finished. These were only put in last because there was no more cargo -- Smith says to Cosmo -- he is working the number 3 hatch right next to number 2 hatch -- he says "The man asked for a ladder to get up out of the hatch." Cosmos says to him in the language of the docks "Get him a ladder. You want a ladder. Get him a ladder." And he went about his own business knowing Smith is an experienced man and that he would get a ladder. He just had to yell down to get it and he thought no more about it until 15

64b

minutes or so later when he is told there is an accident.

Now, this is only moments after the accident. He runs over to number 2 hatch and looks down and what does he see? He sees Mr. Garafola lying on the deck and this fellow Richie down there taking his belt off and putting a tourniquet on Mr. Garafola.

Let's talk about what Mr. Stanziale called an interested witness -- Richie Scott.

Well, I think God and so does Mr. Garafola thank God that Richie Scott was there and saw this because if he wasn't there this man would not be here today and have a law suit. He was bleeding to death down in that hold and even if Mr. Smith says that moments after the accident "I looked over and I saw Mr. Garafola and Richie Scott there" thank the Lord that Richie Scott was there and obeyed his instincts and jumped down into that hold because otherwise he wouldn't be here.

What does this information do to us?

65b

"Circumstances" Mr. Stanziale says. "All of a sudden Richie Scott appears."

If perhaps Richie Scott just testified and had not been down in the hold, perhaps there would be doubt. Perhaps there would be doubt if he just passed it. "Isn't that coincidental" says Mr. Stanziale. But you have the added affect that he was down there with him and he didn't get down there with a ladder.

Do you remember that I asked Mr. Smith "Did anyone ask you for a ladder before the accident" and he said "No."

"What about after the accident -- anyone ask for a ladder?

"No.

"How did the doctor get down there?

"Oh" -- he started to think -- "I don't know."

We know how the doctor got down there. You heard Mr. Cosmo. He said the doctor wouldn't go down there. They wanted to put him on a pallet and lower him down there and he said "nothing doing" and they called for a ladder and got one and it was with a lot of coaching

66b

and cajoling that the doctor even went down the ladder and that is indelibly impressed upon the mind of Mr. Cosmo. He remembers what the doctor looked like.

What does Mr. Stanziale say about the grease? Richie didn't say he saw the grease when he got down there. Richie says "When the doctor came down and put his own tourniquet on" -- and he says to Richie "You have to help me put a splint on the leg. You hold the leg while I put the splint on" -- that's when Richie held the leg so the doctor could put the splint on and he noticed the shoes and then afterwards he saw the grease and the man's heels, feet, whatever is left of them are staring him in the face.

Again, as Mr. Stanziale said "No sympathy" and again I will say this for the last time, we are not here for sympathy but for justice. He will get all the sympathy he wants from family and friends. So. please, I agree with Mr. Stanziale, don't give him sympathy.

Mr. Stanziale had the audacity to

67b

say to you Mr. Garafola is here today and he has everything to lose or to gain. I say to you that on December 20th, 1969, that is when he lost his leg and that is when he lost everything -- not today.

Does Mr. Stanziale disagree with me? No, because he never cross-examined Doctor Baronfeld and then he put on two of his own doctors, the operating doctor, the doctor who saw Mr. Garafola moments after he got in the hospital and who performed the operation and then he put on his specialist, Doctor Silver who saw Mr. Garafola 8 or 9 months after. Does he ask them one pertinent question as to the injuries this man sustained? No. Did he ask Doctor Weiss about the buzzing in this man's ears he claims was not caused by this accident? Doctor Weiss was on the stand. Why didn't he ask about that? Doctor Silver was on the stand. Why didn't he ask Doctor Silver about the buzzing in the ears? He didn't ask because he knew that anything they would have said coincided with what Doctor Baronfeld said.

68b

Now, Mr. Stanziale says to you "I am not going to talk about the injuries. I am not talking about anything. I am only going to tell you that there are certain little discrepancies in Mr. Garafola's story" and I say to you that is the truth.

I say to you that someone telling the truth a year or years later, their version of what happened over a period of time will never coincide because it is only a rehearsed story that is perfect. If you rehearse somebody in that story then he will tell you the same story every time and I say when Mr. Garafola saw these doctors -- and again, what do they know of the fore, aft, port and starboard side of a ship; pallets, containers, machinery -- they listen with half an ear and I am sure in your experience when you visit specialists that is what happens.

Why did Doctor Weiss need another history? He had the record in front of him. You will see the record. There is an emergency history here. How do we know when Doctor Weiss put that there and don't forget

69b

Doctor Weiss is paid by Pittston and Doctor Silver is being paid by Pittston. I don't claim they would do anything because they are getting paid but maybe it colors their thinking a little bit.

What did happen in this case? Mr. Garafola went to work this Saturday, shaped up at the hall, they sent him down to pier 9B. They told him to go to Robbie's gang. Robbie wasn't there. Smith was the hatch boss. Mr. Garafola started to work from 8 in the morning or 8:30 to lunch time. He came back from lunch and went back to work. At 3 o'clock they started to fill the hold with these empty containers and pallets.

You know, there were a lot of men down in that hold beside Mr. Garafola and Rocco. Was one of them ever brought here? They are all Pittston or were Pittston employees.

You will recall that when he opened up in his statement to you, Mr. Stanziale said "I am going to tell you how the accident happened." I believe he said that in summation also. Well, not one word did he tell you.

70b

There were at least 8 men down there and you heard Mr. Smith say there was another gang at the forward end and that is another 8 men. Was any man brought up here except Mr. Smith who wasn't even down there? Nobody.

They asked Mr. Garafola and Rocco Masud "How did the men get up here?" They don't know how. It is not their concern. They have their own job to do. They are doing their job.

Where is this man liable for any contributory negligence? The man is working on his job like you and I. You and I go to work at our jobs. We have a boss. He tells us what to do and this man's boss told him:

"Come on up fellas. We're knocking off.

"Give me a ladder.

"Come on up. We're knocking off. Are you going to spend time with a ladder? Come on up."

You heard what the expert said. He said if you disobey the order of your boss you are subject to dismissal from the gang. What else does this man know? He can't be a prize

71b

fighter anymore. For the past 18 years he earned his bread on our piers bringing merchandise to the United States and taking it out of the United States. His boss tells him to come up and he comes up. He is not an experienced hold man. He told you that. Rocco too, a maintenance man. He too figured "I'll work on Saturday and make a little extra money. I worked all week on the pier. I'll go to work on Saturday. Maybe I can get a job Saturday." They are family men. They want to support their families. This isn't an easy job like sitting behind a desk. This is pure unadulterated physical labor and yet these men were willing to do it and went down there.

Now, what was the condition of this hatch atthe time of the accident? There was a big hold here and a line of pallets up here and right up here is the main deck (indicating document).

You get on a pallet, as Mr. Smith testified to and when you get up here you can put your hand up, jump over and you are safe.

Now, when they climb up on this pallet

72b

this pallet is only, I say, 8 feet high and you heard what Mr. Smith said. He said when the pallets came down they were different sizes, some 3 feet, 5 feet, 6 feet.

Rocco said when the pallets came down in front of the containers they were 3 feet high and from the 3 to 8 feet you climb up. Even if you fell off, what would you fall -- 3 feet? You don't need a net. It's about as high as the ledge here (indicating).

However, once you are up here with an empty container here and you have 16 feet you can fall, the safety regulations, which I will read to you and the law says this must be followed and the Court will so instruct you:

"When an edge of a hatch section or stowed cargo more than 8 feet high is so exposed that it presents a danger of an employee falling the edge shall be guarded by a safety net of adequate strength to prevent injury to falling employees or by any other means providing equal protection under the circumstances."

No net and no other protection.

73b

There was no other way for William Garafola to leave this hatch except this way, under the strict orders of his immediate boss and his refusal to give him a ladder.

What else was the condition of this hatch? Well, Willie Garafola claims that as he got up near the top his foot slipped and down he went and Richie testified to the grease on his hands and you are permitted to infer from that fact there was grease on the pallets making it defective for a ladder.

There was a diagram showing open spaces here and that is a defective condition of a ship . That ship must cross the Atlantic and the Atlantic is not made of glass. The ship sways and as it sways the cargo shifts and for that reason she must be packed tight. That is the primary duty of carpenters and lashers on a ship. How can you send it that way? That should have been packed in tightly. But, they were going home. They were quitting at 5. "Maybe the guys tomorrow will take care of it. As far as we are concerned, let's go home."

74b

As I told you at the beginning of this case, the laws in this case are somewhat different than in other cases, as his Honor will charge you and his honor will give you a set of questions and one of the questions will be, "Do you find the defendant ship unseaworthy?"

MR. STANZIALE: This is the Court's instruction and special findings for the jury.

MR. BUSHLOW: I am not going into the findings.

MR. STANZIALE: I don't think it is proper. The Court will give the special findings to the jury.

THE COURT: Yes, that's true.

MR. BUSHLOW: You will have to decide a question of unseaworthiness and the Court will charge you what unseaworthiness is.

Unseaworthiness is an unsafe condition on a ship. Now, it doesn't make any difference --

MR. O'BRIEN: I object. I think he is invading the province of the Court. I don't object to mentioning the word but the explanation is for the Court.

75b

THE COURT: Yes, that is part of the Court's instructions.

MR. BUSHLOW: If there is an unsafe condition on a ship, if there is something missing for the workmen to use, to perform their work in a safe manner, it doesn't make any difference at all who caused that condition --

MR. O'BRIEN: I will object.

MR. BUSHLOW: I think I am entitled to explain the condition of the ship and the fact that it makes no difference who caused the condition.

MR. STANZIALE: The law of unseaworthiness is the Court's province.

THE COURT: It would seem to be so.

MR. BUSHLOW: I say, that the failure to provide Mr. Garafola with a ladder, the failure to provide a net, in case anybody fell, the grease on the pallets, all caused a condition on this ship which his Honor will charge you, as to the law of unseaworthiness and his Honor will also charge in his charge that no matter how long this condition existed, regardless of

76b

who created this condition or whether the defendant had knowledge of this condition or not --

MR. STANZIALE: Again, I have to object. He is going into notice and your Honor will charge. It is not summations on the facts, your Honor.

THE COURT: Yes.

Try to avoid the legal matters.

MR. BUSHLOW: You will have to decide what the condition was on this vessel at the time Mr. Garafola was hurt, who created this and his Honor will give you the law as to the creation and as to the responsibility of the vessel when a condition is created.

I think, I believe, that when you go into the jury room with your common sense you will have no difficulty in determining that Mr. Garafola slipped from this pallet down into the floor of the vessel and was seriously hurt.

Now, none of these gentlemen went into the injuries and I believe that you should consider what Doctor Baronfeld, in his clear, concise, laymen language told us

77b

about the injury.

The cut in the back of the leg to ease the tension on the skin, about the skin graft, the two pins in this man's ankle and which will be there as long as he lives, about the pain in the shoulder, as he hurt his shoulder coming down, his inability to move and the pain in his neck, the buzzing in his ears and he said it could have happened because he was a boxer but he never complained of it before. The only time he got this was after the accident and that being the case, then the accident was the cause of this buzzing in his ears.

Defense counsel never asked Doctor Weiss about it and never asked Doctor Silver about it and he had an opportunity to.

So, I say to you, I am not going into the seriousness, the horrendous injuries this man sustained. You heard that and it would only be repititious of me to go into it.

Now, we come down to the third part of this case; damages. That is your province. You and you alone are the sole judges of the facts. His Honor decides the law and if his

78b

Honor makes an error I can take him up on appeal and have him reversed because he made an error on the law.

However, if you make an error on the facts there is nothing more I can do. So, I say to you, these people violated their duties and obligations to Mr. Garafola back on December 20th, 1969.

Iask you to do the duty you have been sworn to do; to evaluate the testimony and arrive at a fair verdict.

How are you going to arrive at a fair verdict? Damages. Well, fortunately, through the years there are certain guide lines that help a jury arrive at these damages.

We have what we call specials and I will divide this question of damages into two parts; one from the day of the accident until today and from today into the future.

It has been conceded more than once by Mr. Stanziale and Mr. O'Brien that the plaintiff's medical expenses in this case is sixteen thousand dollars.

It has been conceded that from the date

79b

of this accident until today, approximately four years later, Mr. Garafola has not been able to return to work.

Mr. Garafola has testified that he earned $11,000.00 a year. There has been no contradictory evidence even though this man represents the employer. If this was not so there would have been employment records here.

Mr. Garafola has been out of work for four years. That is $44,000.00 and $16,000.00 for medical expenses --

MR. STANZIALE: I object, your Honor.

There is no testimony or any stipulation that defense counsel has that he has not been able to go back to work.

MR. BUSHLOW: I never said that.

MR. STANZIALE: We concede that.

At the time of the injury he was 63 years of age and I will stipulate for three years.

MR. BUSHLOW: There was no stipulation at all as to that and no contradictory evidence that he hasn't returned --

80b

MR. STANZIALE: I never conceded he was not able to return to work --

MR. BUSHLOW: There is no contradictory evidence he is able.

He has not been able.

Add $16,000.00 to the $44,000.00 and that is $60,000.00 out of Mr. Garafola's pocket. That is easy to figure out . You multiply 11 by 4 and add the $16,000.00, conceded medical expense and you get $60,000.00.

Now, comes the part which is more difficult, and that is the pain and suffering .

Now, you have heard Mr. Garafola testify that for the first two or three years after this accident he was laying in the hospital on his back for three and a half months with skin grafts, slits down the back of his leg and ankle, fusions, pins, screws, put in his leg and then they put him in a wheel chair for about two months and then they said "You can go home" and he went to his daughter's house in a wheel chair. He was in a wheel chair for 6 or 7 months with crutches trying to get out and walk and he tried. He doesn't want to make himself a cripple. He tried

81b

and then he was on crutches and Doctor Silver said that when he came into the office -- and so does Doctor Weiss say this almost two years later -- he came in on crutches and he was only ambulatory with crutches.

Every day, every day for four years pain in that leg. Crutches. Hobbling around. Mental anguish. All this from an active man in good health. You can see how he has kept himself over the years. A man who tried to keep himself physically fit, now hobbling around.

What is this four years of pain and suffering worth? You must decide that. You must arrive at a reasonable, fair and adequate amount.

Now, we go into future pain and suffering.

We don't know how long anyone of us will live. That is in the hand's of the Lord. However, there are certain tables and statistics set down through the years giving us some kind of guideline and his Honor will so charge that the tables and statistics approximate that a man of Mr. Garafola's age, 67, has another approximation of 10 years to live.

82b

Now, that doesn't mean that he is going to live ten years. He may live two or he may live twenty. We don't know. But we have to have something to base some of our claims on and we use that so it can help you.

You have heard Mr. Garafola's testimony as to the pain in his leg, the crippling, the buzzing in his ears, the medication to go to sleep and taking that into consideration with the ten years Mr. Garafola has in the declining years of life, considering that he is to be shackled with the injury subjected upon him by these people 3,650 days, 90,000 hours of pain and suffering -- I ask you to consider that.

It is bad enough we are all subject to ills that come about within us but I am sure the good Lord never intended a man finish out his life in the condition Mr. Garafola is in now. You will have to decide how much that is worth. I know it is difficult but unfortunately, that is your obligation. That is your job here. It is your sworn duty to deicide.

What more can I say about this case?

83b

What more can I say about this case that you haven't heard and seen?

I grow emotional. I can yell and scream but I don't have to. That screams out loud enough (indicating plaintiff). I don't have to.

Mr. Garafola is suing for $500,000.00. I don't know what the value of life is. I don't know the value of piece of mind, of being free from pain not brought about by yourself or brought about because of an illness you cannot help. I don't know. I only give you these guidelines and say to you, use your common sense, your everyday experience.

What about Mr. Garafola's future loss of earnings? You see the shape this man is in. You heard the testimony of the doctor. He said he was doing very heavy physical labor. Was there any contradictory testimony? He would have a loss of 55 or $33,000.00 if he worked 5 or even 3 more years.

I say Mr. Garafola was not liable for any contributory negligence. He did what he was ordered to do and he couldn't refuse

84b

for fear of losing his job. Where can he go for a job when this is all he knows?

Mr. Garafola now leaves in your hands the rest of his life. He knows you will do what your conscience dictates and he sits there knowing full well he will be vindicated.

Again, let me thank you for your patience and kindness.

(continued on next page)

C H A R G E

THE COURT: Members of the jury, now that the presentation of evidence in this action has been completed, it is the function of the Court to instruct you on the law.

You are the sole judges of the facts in the case. The facts or evidence consist of the testimony of the witnesses, the facts stipulated and the exhibits marked in evidence.

Statements made by counsel in support of their objections, in summations or otherwise, are not proof, although they may be helpful to you in ascertaining the truth. Your recollection of the testimony, however, is what you should take into consideration in arriving at your verdict.

The Court made rulings in the course of the trial in admitting or excluding evidence, or otherwise. You are obligated to accept those rulings and the instructions given in this charge.

Disregard any evidence which the Court ordered stricken from the record. None of the rulings made by the Court or statements

by it are to be regarded by you as an indication of the Court's opinion of the issues and evidence in this case.

The plaintiff in this action is William Garafola. F.A. Detjen, the shipowner, is a defendant and is also a third party plaintiff against Pittston Stevedoring Company, the stevedore named as third party defendant. The defendants Detjen and Pittston are corporations and may act only by their agents, servants and employees.

The plaintiff, William Garafola, instituted this action against the defendant, Detjen SAAR -- SAAR is the name of the ship -- the shipowner, to recover damages for personal injuries allegedly sustained by him owing to the unseaworthiness of the ship and the negligence of the shipowner.

The shipowner has impleaded as third party defendant, the Pittston Stevedoring Company, which employed the plaintiff on the claim that if the plaintiff recovers damages against the shipowner, then the stevedore should indemnify the shipowner therefore

because of a breach of its warranty to render workmanlike service. The defendants Detjen and Pittston are corporations and may act only by their agents, servants and employees.

If you find that the accident did not occur in the manner claimed by the plaintiff or if you find that the plaintiff's injuries were caused solely through his own fault or if you find that such injuries were caused solely by the negligent use of reasonably fit equipment, or if you find that such injuries resulted solely from the manner in which the work was done under the supervision of the stevedore, then in either of those events, you should cease your deliberations and render a verdict for the defendant shipowner.

On the other hand, if you do not find for the shipowner on these issues, then you should consider whether the unseaworthiness of the ship or the shipowner's negligence, or both, was or were the proximate cause or causes of the plaintiff's injuries. Proximate cause is defined as the casual connection between such unseaworthiness and/or negligence and the

plaintiff's injuries.

I shall now charge on the maritime law of unseaworthiness. The mere happening of an accident on the subject ship does not render the shipowner liable therefore. The shipowner is not obligated to furnish an accident free ship. The shipowner was not an insurer or guarantor of the safety of the plaintiff.

The plaintiff was lawfully aboard the vessel. In his capacity of longshoreman, he was rendering an essential maritime service to the ship in performing work traditionally carried on by seamen or crew members.

Maritime law requires a shipowner to maintain its vessel in a seaworthy condition meaning that the vessel, its decks, equipment and gear including equipment brought on board by the stevedore and used and controlled by it must be reasonably fit for its intended use. The standard for seaworthiness is not perfection but reasonable fitness under all the circumstances. The shipowner must also furnish a reasonably safe place to work, meeting the said standard for seaworthiness. These duties

are absolute and non-delegable. The plaintiff did not assume the risk of an unsafe place to work.

On this issue of unseaworthiness, the plaintiff is not obligated to establish negligence on the part of the shipowner or notice to the shipowner of the claimed unseaworthiness. The plaintiff, however, was obligated to make reasonable use of his own faculties to observe and avoid danger.

If you find that the vessel or any of its equipment was unseaworthy and that such condition was the proximate or producing cause of the plaintiff's injuries, you should render a verdict for the plaintiff on that issue.

On the other hand, if you find that the vessel was seaworthy or that is condition was not the proximate cause of the plaintiff's injuries, you should render a verdict for the shipowner on that issue.

As previously stated, the plaintiff claims that the negligence of the shipowner, as well as the unseaworthiness of the vessel, was a proximate or producing cause of his injuries.

90b

On the issue of negligence I charge you that the shipowner's duty was to do what a reasonably prudent person would ordinarily have done under the circumstances and to furnish the plaintiff with a reasonably safe place to work.

While the plaintiff did not assume the risks of his employment, yet he may not recover on his claim of negligence if you find that his injuries were caused solely by his own fault or if they resulted solely from the manner in which the work was done under the supervision of the stevedore.

If you find that the shipowner was negligent or that both the plaintiff and the shipowner were negligent and that such negligence was the proximate or producing cause of the plaintiff's inuries then you should render a verdict in favor of the plaintiff on that issue.

On the other hand if you find that the shipowner was not negligent or that the negligence of the shipowner was not the proximate cause of the injuries, then you should render a verdict for the defendant, shipowner, on that issue.

91b

If you find the defendant liable, then you must determine the amount of damages for the plaintiff. They include the reasonable value of the medical services hereby stipulated in the sum of $16,000.00 and also such sum as you find represents a reasonable sum in money for the pain and suffering and mental anguish caused by the accident and injuries and such further sum as you find will compensate him for any future pain, suffering and anguish that you find he is reasonably likely to suffer in the future from his injuries. The damages also include such amount of earnings as you find the plaintiff lost to date by reason of his injuries.

In considering future pain and suffering and anguish, you may consider that a white male, 67 years of age has an average remaining lifetime of about ten years.

Any award for future lost earnings must be discounted to its present value and in reducing any such award you can discount it by at least five percent because money, invested today can reasonably be expected to earn at least

that amount.

If you find that the plaintiff in any way contributed to the occurrence of his accident, then his negligence is imputable to his employer, the third party defendant, Pittston, and you may find in favor of the shipowner against the stevedore.

If you find the plaintiff was contributorily negligent in the performance of his work on the ship then Pittston Stevedoring Company has breached its warranty to perform its work in a reasonably safe, proper and workmanlike manner.

If you find that the negligence of the plaintiff contributed to the accident, such contributory negligence of the plaintiff does not bar a recovery by him. The burden of proving such contributory negligence of the plaintiff is upon the defendant. However, such proof may be supplied by evidence adduced by the plaintiff. You must determine the proportion or percentage of such contributory negligence, if any, and you must then diminish or reduce the plaintiff's damages in proportion to the

amount of negligence attributable by you to the plaintiff. I explain this rule of proportional or joint negligence by an example, i.e., if you found that the entire damage sustained by the plaintiff was such and such a sum and found that the plaintiff and the defendant were each 50 percent negligent, or, in other words that both of those parties were equally negligent, you would reduce the plaintiff's damage by one half or 50 percent and render a verdict in favor of the plaintiff for that amount.

The shipowner employed the defendant stevedore to load the ship. The stevedore warranted to the shipowner that it would perform its services in a reasonably safe, proper and workmanlike manner and would furnish a safe place for its employees to work, including access to the ship. There is an implied warranty to perform, no formal contract is required.

The stevedore's warranty applies not only to the stowage and handling of cargo by the stevedore but also to the use by the stevedore of the vessel's equipment, incidental thereto.

The stevedore breaches its warranty if

it fails to correct a dangerous condition or fails to call upon the ship's personnel to do so and if it fails to hold up the work of loading until correction is effected. It is liable if a workmanlike performance would have eliminated the risk of injury.

Negligence is not an element of the indemnity claim.

Now, I will give you some of the safety and health regulations for longshoring issued pursuant to the United States Secretary of Labor and some of these have been called to your attention by counsel.

Section 1504 point 2 is entitled Scope and Responsibility.

"(a) The responsibility for compliance with the regulations of this part as placed upon employers is defined in section 1504 point 3(c)."

Section 1504 point 3(c) reads as follows:

"The term employer means an employer, any of whose employees are employed in whole or part in longshoring operations or related employment as defined herein within the

federal maritime jurisdiction on the navigable waters of the United States.

"(d) The term employee means any longshoreman or other person engaged in longshoring operations or related employment within the federal maritime jurisdiction on the navigable waters of the United States other than the masters, ship's officers, crews of the vessel or any person engaged by the master to load or unload under 18 net tons."

Section 1504 point 3(j) reads"

"The term longshoring operations means the loading, unloading, moving or handling of cargo, ship's store, gear either into, in or on or out of any vessel on the navigable waters of the United States."

Section 1504 point 25 entitled "Ladders" subdivision (e) reads:

"When necessary to obtain access to or from a stowed deck load or other cargo and no other safe means is available ladders or steps of adequate strength and positively secured against shifting or slipping shall be furnished.

"If portable straight ladders are used

they shall extend at least 36 inches above the upper landing surface.

"Adequate steps formed by cargo is acceptable if the storage permits."

This does not apply to what is covered by 1504 point 24(f).

I think that covers the sections you called attention to.

MR. O'BRIEN: Yes, sir.

MR. BUSHLOW: There is one more, your Honor, on the safety net.

THE COURT: What is that?

MR. BUSHLOW: The safety net, your Honor.

That is 1504 point 32 subdivision (b).

THE COURT: Suppose you mark it, counsel. There are so many subdivisions here.

(pause)

THE COURT: Section 1504 point 32 subdivision (b):

"When an edge of a hatch section or stowed cargo more than 8 feet high is so exposed that it presents a danger of an employee falling, the edge shall be guarded by

a safety net of adequate strength to prevent injury to falling employees or by other means providing equal protection under the existing circumstances."

If you find that the defendant, stevedore, breached its warranty of workmanlike service and that such breach was the proximate cause of plaintiff's injuries, you should render a verdict in favor of the shipowner and against the defendant, stevedore, on that issue.

On the other hand, if you find that the defendant did not breach such warranty, you should render a verdict in favor of the defendant stevedore on that issue.

The burden or obligation is upon the plaintiff to prove by a fair preponderance of the credible or believable evidence as to the truth of his claims. Preponderance of evidence does not necessarily mean the greater number of witnesses but it means the quality of the testimony of the witnesses and of the evidence.

The defendant has no duty to disprove any of the plaintiff's claims.

98b

If you find as to any of the plaintiff's claims that the plaintiff failed to sustain his burden of proof or that the evidence is evenly balanced, then you must find for the defendant on such claim.

If you are unable to decide in what manner the accident happened, your verdict should be for the defendants.

The rules of evidence ordinarily do not permit a witness to testify as to his opinions or conclusions. A so-called expert witness is an exception to this rule. The witness, Mr. Keeler, who by education and experience has become expert in his profession or calling was permitted to state his opinion as to matters on which he is versed and which is material to the case and may also state his reasons for such opinion. You should consider experts opinions received in evidence in this case and give them such weight as you think they deserve; and you may reject the same entirely if you conlude that the reasons given in support thereof are unsound.

Different inferences may be drawn from

the facts and circumstances in the case, whether proved by direct or circumstantial evidence. It is for you to decide and for you alone, which inference you will draw from the facts.

Surmises, suspicions and speculations should not enter into your deliberations. They are not evidence. Your verdict should be based on the facts you find are established by the evidence.

Neither sympathy, bias nor prejudice should enter into your deliberations and should have no part therein. All parties stand equal before the Court and are entitled to even-handed justice. The fact that plaintiff is an individual while the defendants are corporations should in no wise influence your judgment.

The quality of the testimony of the particular witnesses, regardless of who calls them, rather than the quantity or the number of witnesses is the test to be used in arriving at your decision. There is no presumption that the witnesses for the plaintiff are more or less truthful or credible than the witnesses for the defendants.

100b

You are the sole judges of the credibility or believability of the witnesses and the weight to be given to their testimony. In determining this you are entitled to take into consideration their bias, if any, their relationship to the parties, their interest in the outcome of the case, if any interest exists, their manner of testifying, their candor and frankness and any other test which you would ordinarily use in judging the weight to be given to the statements of persons with whom you come into contact.

If you find any witness wilfully testified falsely to a material fact in the case, you may disregard his or her testimony altogether, but you are not bound to do so and you may accept such testimony as you believe to be true and reject such testimony as you believe to be false.

There can be no verdict of the jury, either for the plaintiff or for the defendants unless such a verdict is unanimous.

Now, there will be handed to the foreman of the jury at the conclusion of this charge, a

form of special verdict in this case and it reads as follows:

"(1) Do you find that plaintiff has established his claim against the defendant shipowner?

(a) of unseaworthiness?"

And the answer will be "yes or no."

"(b) of negligence?"

And the answer will be "yes or no."

"(c) If either answer or both is 'yes', what is the total amount of damages?"

There is a space for the amount if any.

"(2)(a) If you find that plaintiff is entitled to damages, did the defendant shipowner sustain its burden that plaintiff contributed to the accident?"

Yes or no.

"(b) If the answer to 2(a) is 'yes', what percentage of the fault is attributable to the plaintiff?

"(3) Deducting the percentage from the total amount of damages referred to in 1(c), what sum do you find plaintiff is entitled to recover from defendant shipowner?"

Then, it continues:

" The following question is to be answered only if you find plaintiff is entitled to a verdict against the defendant shipowner.

"(4) In the action of the shipowner against the stevedore, do you find that the stevedore breached its warranty to the shipowner to perform its work in a reasonably safe and workmanlike manner?"

And you will answer "yes or no."

Now, will counsel approach the bench.

(Side bar discussion)

THE COURT: Any exceptions to the charge?

MR. BUSHLOW: If you would let the jury go for a moment, I think we could iron out the exceptions and requests.

(Conclusion of side bar discussion)

(Following held in open court)

THE COURT: Members of the jury, do not discuss the case but I will ask you to withdraw to the jury room for a short time and then I will call you back.

(Jury excused at 12:45 p.m.)

THE COURT: Will the marshal step forward.

I plan to send the jury to lunch as soon as we get through here. I thought you might want to know about it.

THE MARSHAL: Yes, sir.

MR. BUSHLOW: If your Honor please, the plaintiff objects to that portion of the charge where your Honor charged the jury that if the jury finds that the stevedore carried on its operations in a negligent manner then they must find for the defendant.

It is my contention, your Honor, that even if the stevedore carried on its operations in a negligent manner that negligent manner by repetition, would render the ship unseaworthy -- there are cases on it -- therefore, not precluding the plaintiff from a recovery.

I would ask the Court to charge -- that is my exception, your Honor -- I would ask the Court to charge --

MR. O'BRIEN: I thought that was given in connection with the third party claim over.

THE COURT: I thought I charged on that.

MR. O'BRIEN: I thought it was in

connection with the claim over.

THE COURT: I think I have covered that.

MR. O'Brien: I would like --

MR. BUSHLOW: I have an exception.

MR. O'BRIEN: The only exception is that it was not delivered in the language requested.

MR. STANZIALE: I except on the same ground.

MR. BUSHLOW: I request that the Court charge the jury that the plaintiff is not chargeable with the negligence or actions of the stevedore or company employees but is only chargeable with his own actions.

THE COURT: Yes.

MR. BUSHLOW: That is one.

I also request the Court to charge that the plaintiff does not have to establish both unseaworthiness and negligence to recover; that he may establish either.

THE COURT: I think that the special verdict covers that.

MR. BUSHLOW: All right.

Now, I would also like the Court to

105b

charge that the negligence or unseaworthiness need not be the sole cause of the injuries and damages. It is enough if that negligence and/or unseaworthiness plays a part, however slight, in bringing the accident about.

THE COURT: I think I have fully covered that.

Anything else?

MR. BUSHLOW: Yes. I would like your Honor to charge that the burden of proof as to the defense of contributory negligence is upon the defendant, which he must prove by the preponderance of credible evidence.

THE COURT: I charged that.

MR. BUSHLOW: I don't know.

I know unseaworthiness is a very difficult doctrine for laymen to understand.

I would ask the Court to charge the plaintiff is not required to prove that the entire vessel was unseaworthy; that all he must prove is that no adequate safe means of access to the cargo in the area in which he was working and where the plaintiff was working, was available.

106b

THE COURT: Well, we have certainly centered on this lowering from the hatch.

MR. BUSHLOW: Except for one thing: The plaintiff does not have to prove the entire vessel unseaworthy. I know most people think to be unseaworthy means that when the vessel goes out it would sink.

THE COURT: I think that would be only superfluous.

MR. O'BRIEN: I would like your Honor to charge as follows: In determining whether plaintiff was contributorily negligent you must consider the plaintiff is required as his duty, to use reasonable care to avoid anything that will result in injury to himself.

THE COURT: I charged reasonable care already.

MR. O'BRIEN: I further request that your Honor charge the jury that if they find that Pittston Stevedoring Company was negligent in performing its work it breached its warranty to do its work in a reasonable, safe, proper workmanlike manner.

THE COURT: It is in the special verdict.

MR. O'BRIEN: There is nothing about negligence as to the thing over. There is only one question relating to the claim over and that is whether or not there was a breach of the workmanlike performance.

MR. STANZIALE : For the record, it was Mr. O'Brien's drafting of item number 4 in the special verdict and all counsel agreed.

MR. O'BRIEN: I want it charged.

MR. STANZIALE: I think the Court covered it.

MR. O'BRIEN: exception, your Honor.

MR. BUSHLOW: I have noted my exceptions.

MR. STANZIALE: I have noted my exceptions.

MR. BUSHLOW: Are you going to charge that the plaintiff is only responsible for his own actions?

THE COURT: Yes, I will do that.

(Jury entered jury box at 12:50 p.m.)

THE COURT: There is just an additional charge, members of the jury and that is that the plaintiff is not chargeable with the negligence of anyone else. It is only his own negligence, if any, that is to be

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considered.

Will the marshal step forward.

(Marshal sworn by the Clerk of the Court at 12:50 p.m.)

THE COURT: I may say that I will ask my assistant to see that the exhibits are delivered to the jurors in the jury room and also this special verdict which I have called attention to.

THE COURT: Now, I am going to send the jurors to lunch under the custody of the marshal.

At times we excuse the alternate jurors at this point but I think you have served so well here I will allow the alternate jurors to go with the other 12 jurors to luncheon.

I caution you ladies and gentlemen, do not discuss the case in the luncheon room or on the way to or from. There's no need to mention it until you get into the jury room upon your return.

As to the alternate jurors they will be discharged upon their return to the courtroom.

It will be considered they are discharged on your return to the jury room.

I may mention this: On one occasion, quite a while ago, and it has become public notice, I made the same statement to the jurors and it was later brought to my attention that one of the alternate jurors was in the jury room and there was a news item which said in effect we have a 13 member jury in the case. That juror must have been so conscientious that she wanted to stay in the jury room but we had quite a turmoil over it and after considerable consideration we finally came to a conclusion on it.

Now, let's not have more than 12 jurors on this case.

Now, Mr. Marshal, do you want the jury to go to the jury room?

THE MARSHAL: Yes, please.

THE COURT: If you will retire to the jury room and await the marshal's call for your going to luncheon, you may do that.

(Jury excused at 12:55 p.m.)

MR. STANZIALE: One other item: I except

to the Court's last charge.

THE COURT: It is noted.

(Recess taken)

(Jury entered jury box at 3:40 p.m.)

THE COURT: You may be seated.

The Court has received your message to send in the transcript of the testimony of John Smith and Rocco Masud. We don't have the transcripts and it is a regular procedure to have it read by the reporter.

Now, we did have different reporters on each one of those. We have John Smith's reporter here and I will ask her to read that and ask the foreman to inform me through the other jurors when you have heard enough of that testimony.

Very well, you may proceed.

(Record read by reporter)

THE COURT: I take it the jurors heard sufficient? I see you have raised your hand.

JUROR NUMBER 1: Yes.

Your Honor, we'd like to hear Mr. Masud's testimony right now.

THE COURT: Well, the other reporter is

in another branch of the court. As soon as we hear from him we will let you know.

You may now withdraw to the juror room.

(Jury excused at 3:55 p.m.)

(Jury entered jury box at 4:05 p.m.)

JUROR NUMBER 1: Your Honor, the jury feels that it is not necessary to read Mr. Masud's testimony at this time.

THE COURT: Very well.

JUROR NUMBER 1: We apologize to the Court for the inconvenience.

THE COURT: That is the jury's province, to decide what it wants.

You may now withdraw to the juror room.

(Jury excused at 4:10 p.m.)

(Time noted: 4:20 p.m.)

THE COURT: Gentlemen, I have a note.

The foreman of the jury would like to speak to the Judge about the special verdict.

I don't know what this last word is --

MR. O'BRIEN: It looks like "procedure" to me, your Honor.

THE COURT: Well, bring in the jury.

THE CLERK: Jury note requesting

testimony of Masud and Smith marked as Court exhibit 1.

(So marked)

THE CLERK: Jury note requesting information as to the special verdict marked Court exhibit 2.

(So marked)

(Jury entered jury box at 4:20 p.m.)

JUROR NUMBER 1: Your Honor, the jury would like the special verdict clarified a little bit more.

THE COURT: Let me say this -- and I will ask for any comments by counsel -- the first item you are to consider is whether you find that the plaintiff has established his claim on the item of unseaworthiness.

The second item is whether you find that the plaintiff has established his claim against the shipowner on the issue of negligence and then number C, under that item of unseaworthiness and negligence, "If either answer or both is 'yes', what is the total amount of damages?"

So, if you find a yes on either one of those items then you would go to the question

of determining the amount of damages.

Is that understandable?

JUROR NUMBER 1: Yes.

THE COURT: On 2(a) "If you find that plaintiff is entitled to damages, did the defendant shipowner sustain its burden that plaintiff contributed to the accident?"

In other words, do you find contributory negligence on the part of the plaintiff.

Then, "If the answer to 2(a) is 'yes' what percentage of the fault is attributable to the plaintiff?" Ten percent, 15 percent, whatever it is.

Then, you deduct the percentage from the amount of damages if you find the plaintiff is entitled to recover from the shipowner.

The last item is a question you should answer only if you find the plaintiff is entitled to find a verdict against the shipowner.

"Do you find that the stevedore breached the warranty to the shipowner to perform the work in a reasonably safe workmanlike manner?"

You would answer that "Yes or No."

Does that cover the situation?

114b

JUROR NUMBER 1: Yes.

THE COURT: Very well. If you understand it, members of the jury, you may withdraw.

(Jury excused at 4:30 p.m.)

(Time noted: 4:50 p.m.)

THE CLERK: Jury noted marked Court exhibit 3.

(So marked)

(Jury entered jury box at 4:50 p.m.)

THE COURT: Members of the jury, I have your note and I quote it:

"The jury would like a definition of seaworthiness and what determines the seaworthiness of a ship while loading it or unloading it."

I charge you that maritime law requires a shipowner to maintain its vessel in a seaworthy condition, meaning the vessel, decks, equipment and gear including equipment brought on board by the stevedore and in control of it and including the procedure of loading and unloading it.

Does that satisfy you?

JUROR NUMBER 1: Yes.

THE COURT: Very well.

Members of the jury, I don't want to hurry you but I want to know, do you think it will take much time to come to a verdict?

JUROR NUMBER 1: Right now it looks like it will be a little while. I cannot say how long.

THE COURT: I will check with you in a little while.

(Jury excused at 5:00 p.m.)

THE CLERK: Jury note requesting definition of seaworthiness marked as Court exhibit 3.

(So marked)

MR. STANZIALE: Your Honor, the defendant Pittston Stevedoring Company excepts to the charge now given by the Court by insertion of the words "loading and unloading."

THE COURT: I read it to you.

MR. STANZIALE: I excepted then in chambers.

THE COURT: I didn't hear any exception.

MR. STANZIALE: In chambers, I did.

THE COURT: I didn't hear any suggestions from you on it.

MR. STANZIALE: My suggestion was, if you remember, that the cases given to the jury on unseaworthiness, I was in agreement on that and any addition to the Court's charge I will except to.

THE COURT: I am just repeating. I thought it was consented to.

MR. STANZIALE: Just note my exception for the record, your Honor.

THE COURT: Well, I made my statement.

(Recess taken)

(Jury entered jury box at 5:25 p.m.)

THE COURT: Members of the jury, it is not 5:25 p.m. and it is a time usually, when we try to suspend the court for a number of reasons. This is not a good area to be moving around in in the evening as you probably know. So, unless there is disagreement on the part of the jury I would now recess this case until Monday morning at ten o'clock.

Is that satisfactory?

JUROR NUMBER 1: The jury feels that the amount of time we will need is approximately a half hour.

117b

THE COURT: I want to get your view. I don't want to hurry you. If it is a matter --

JUROR NUMBER 1: We are approaching a decision.

THE COURT: All right then, gentlemen. You may withdraw or ladies and gentlemen, rather, you may withdraw.

(Jury excused at 5:30 p.m.)

(Jury entered jury box at 5:45 p.m.)

THE COURT: Members of the jury, I have your note and I quote it:

"The jury has reached a decision."

Have you filled in the special verdict form?

JUROR NUMBER 1: Yes, your Honor.

THE COURT: Suppose you let me have it.

(Document handed to Court)

THE COURT: The answer to 1(a), unseaworthiness is "Yes."

The answer to 1(b), negligence is "No."

"What is the total amount of damages?" The answer is "$235,000.00."

"If you find that plaintiff is entitled to damages, did the defendant shipowner sustain

its burden that plaintiff contributed to the accident?" The answer to that is "No."

Number 4, "In the action of the shipowner against the stevedore, do you find that the stevedore breached its warranty to the shipowner to perform its work in a reasonably safe and workmanlike manner?" and the answer to that is "Yes."

Any comments or applications by any of the parties?

MR. STANZIALE: I'd like to make motions in the absence of the jury.

THE COURT: All right.

If there is nothing else from the jury, we will discharge the jury from further service in this case and members of the jury, you have been very conscientious in the consideration of this case and you are discharged from further service in this case at this time.

THE CLERK: Report to central jury room Monday morning.

MR. BUSHLOW: On behalf of Mr. Garafola, I wish to thank you.

MR. STANZIALE: Thank you, jurors.

119b

MR. O'BRIEN: Thank you.

THE COURT: The special verdict presented by the jury is now made part of the Court record.

MR. O'BRIEN: At this time the defendant and third party plaintiff renews all motions made during the trial and further moves for judgment, notwithstanding the verdict, or in the alternative, for a new trial and on the ground that the verdict is excessive.

THE COURT: Denied.

MR. STANZIALE: I join those motions, renew all my motions and all motions available to me under the Federal Rules of Civil Practice and Procedure.

MR. BUSHLOW: There is no Civil Practive here.

MR. STANZIALE: Federal.

THE COURT: Denied.

MR. O'BRIEN: Can I work out an arrangement with Mr. Stanziale as to the counsel fees? If we cannot stipulate we will have a hearing.

THE COURT: Oh, that's all right.

120b

MR. O'BRIEN: There is no rush. We have a lot of things betweennow and Christmas.

THE COURT: Oh, no rush.

MR. STANZIALE: May I have a 30 day stay of execution to protect my rights for appeal?

MR. BUSHLOW: No objection.

Will judgment be entered Monday?

THE CLERK: Immediately.

MR. BUSHLOW: Interest runs.

THE COURT: I think there is an automatic 10 day stay.

MR. BUSHLOW: Yes.

THE COURT: Any objections?

MR. O'BRIEN: No, your Honor.

MR. STANZIALE: No, your Honor.

THE COURT: Good day, gentlemen.

* * * * *

SPECIAL VERDICT

71 C 658

WILLIAM GARAFOLA v. F.A. DETJEN v. PITTSTON STEVEDORING

Special Verdict

1. Do you find that plaintiff has established his claim against the defendant shipowner?

   (a) of unseaworthiness? √Yes or No

   (b) of negligence? Yes or √No

   (c) if either answer or both is Yes, what is the total amount of damages? $235,000

2. (a) If you find that plaintiff is entitled to damages, did the defendant shipowner sustain its burden that plaintiff contributed to the accident? Yes or √No

   (b) If the answer to 2(a) is Yes, what percentage of the fault is attributable to the plaintiff? %

3. Deducting the percentage from the total amount of damages referred to in 1(c), what sum do you find plaintiff is entitled to recover from defendant shipowner? $_____

THE FOLLOWING QUESTION IS TO BE ANSWERED ONLY IF YOU FIND PLAINTIFF IS ENTITLED TO A VERDICT AGAINST THE DEFENDANT SHIPOWNER.

4. In the action of the shipowner against the stevedore, do you find that the stevedore breached its warranty to the shipowner to perform its work in a reasonably safe and workmanlike manner? √Yes or No

JUDGMENT APPEALED FROM

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

71 Civil 658

WILLIAM GARAFOLA,

Plaintiff,

—against—

F. A. DETJEN, "SAAR",

Defendant & Third Party Plaintiff,

—against—

PITTSTON STEVEDORING CORP.,

Third Party Defendant.

FINAL JUDGMENT

This action having come on for trial before Honorable Walter J. Bruchhausen and a jury, and the jury having rendered a verdict in favor of the plaintiff and against the Defendant and Third Party Plaintiff for the sum of $235,000, and for the recovery for full indemnity by the Defendant and Third Party Plaintiff against the Third Party Defendant,

AND, a purported "judgment" dated December 7, 1973, having been entered on December 10, 1973 without any direction by the Court for the entry of the same pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, notwithstanding that this action has not yet been finally

determined by the fixing of the amount of the "costs and reasonable counsel fees" referred to in the said purported judgment,

AND the United States Court of Appeals for the Second Circuit having by order dated March 12, 1974 dismissed the appeal of the Third Party Defendant from the said purported judgment for lack of jurisdiction, on the ground that it is not of Civil Procedure, nor a final judgment within the meaning of 28 U.S.C. Sec. 1291, and the protective cross appeal therefrom being hereby withdrawn for the same reason,

AND the amount of attorneys' fees and disbursements of the Defendant and Third Party Plaintiff recovered by it against the Third Party Defendant having been stipulated in the sum of $5,615.63,

Now, upon the said jury verdict and the annexed stipulation fixing the amount of attorneys' fees and disbursements, it is

ORDERED AND ADJUDGED as follows:

1. The purported final judgment dated December 7, 1973 and entered on December 10, 1973 be and is hereby superseded and vacated.
2. The plaintiff, William Garafola shall recover of and from Defendant and Third Party Plaintiff, F. A. Detjen, "SAAR" the sum of $235,000 together with costs heretofore taxed in the sum of $244.36, amounting in all to the sum of $235,244.36.
3. Defendant and Third Party Plaintiff, F.A. Detjen, "SAAR" shall recover of and from the Third Party

Defendant Pittston Stevedoring Corporation the said sum of $235,244.36, together with the sum of $5,615.63, attorneys' fees and disbursements as stipulated, amounting to the total sum of $240,859.99, with taxable costs.

4. The supersedeas bond of Liberty Mutual Insurance Company dated January 15, 1974 heretofore filed by Pittston shall remain in full force and effect and shall be applicable to this final judgment and shall secure both the plaintiff's recovery of the Defendant and Third Party Plaintiff against the Third Party Defendant up to the amount therein stated, in the event of any timely appeal from this final judgment by the Third Party Defendant and any cross appeal by the Defendant and Third Party Plaintiff.

Dated: Brooklyn, New York
December 13, 1974

WALTER BRUCHHAUSEN
U.S.D.J.

NOTICE OF APPEAL

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

71 Civil 658

PIK:CM 9964

WILLIAM GARAFOLA,

Plaintiff,

—against—

F. A. DETJEN, "SAAR",

Defendant & Third Party Plaintiff,

—against—

PITTSTON STEVEDORING CORP.,

Third Party Defendant.

SIRS:

PLEASE TAKE NOTICE that the Third-Party Defendant, PITTSTON STEVEDORING CORP., hereby appeals from the judgment of this Court dated December 13, 1974, in favor of the plaintiff and against the defendant in the amount of $235,244.36, and in favor of the defendant and Third-Party Plaintiff against the Third-Party Defendant in the amount of $240,859.99, and said Third-Party Defendant

appeals from each and every part of said judgment, as well as the whole thereof.

Dated: New York, New York
January 9, 1975

JOSEPH ARTHUR COHEN
A Member of the Firm
of
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Joint Appendix

IS HEREBY ADMITTED.

DATED: May 8, 1975

Alexander, Ash, Schwartz & Cohen

Attorneys for Third Party Defendant-Appellant

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Joint Appendix

IS HEREBY ADMITTED.

DATED: 5/8/75

Steven Brechtel

Attorney for